

Study

APPEALING GOVERNMENT CONTRACT DECISIONS: REDUCING THE COST AND DELAY OF PROCUREMENT LITIGATION WITH ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES

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INTRODUCTION

Within the government contracts community, a small but promising movement has begun away from a perilous trend of red tape, proceduralism, and intolerable delay. Most contractors, agency officials, government attorneys, auditors, inspector generals, and administrative judges agree that government contract appeals have become too complicated, too expensive, and altogether too time-consuming.

As with most federal programs, problems stem from more than a single source and span a wide range of factors. These factors include, but are not limited to, contracting officers' lack of authority, overloaded boards of contract appeals (BCAs), and political and organizational failures. Despite Congress' declared goals in the Contract Disputes Act of 1978 (CDA)¹ to encourage negotiated settlement by providing an expeditious alternative to court litigation,² appeals now rarely are resolved expeditiously or inexpensively in any forum.

Today's appeals system is cumbersome for a number of reasons. Many contracting officers fear being second-guessed by

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1. 41 U.S.C. §§ 601-613 (1982 & Supp. V 1987).

2. "The act's provisions help to induce resolution of more contract disputes by negotiation prior to litigation" S. REP. NO. 1118, 95th Cong., 2d Sess. 1, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5235, 5235.

superiors, auditors, congressmen, or the press. This fear significantly reduces any incentive to take sensible steps to settle a complex or controversial problem. Not surprisingly, this uncertainty can cause some contractors to prefer simply to appeal a decision rather than to waste their time negotiating a tenuous settlement. Increasingly, management problems are handed over to lawyers and accountants to be resolved in forums hardly designed for efficiency. Often, the criteria used are only marginally relevant to the real issues in the dispute, resulting in an ever increasing caseload at many appeals boards. Most notably, the active docket of the Armed Services Board of Contract Appeals (ASBCA) virtually has doubled since 1979 without a concomitant increase in manpower.³ A common complaint is that the boards themselves, originally created as a sort of alternative means of dispute resolution (ADR), have become too "judicialized."⁴ The burdens of traditional litigation, the very situation the boards were created to avoid, are now virtually inevitable because of the increased use of depositions, discovery, and opinion writing.⁵

Interest in improving resolution of disputes has risen steadily since 1972, when the Commission on Government Procurement recommended that an informal conference be instituted before any appeal by the contractor to review contracting officer decisions adverse to the contractor.⁶ The Office of Federal Procurement Policy (OFPP) issued a subsequent policy directive which encouraged informal discussions "before issuance of a contracting officer's decision on a claim, . . . to the extent feasible, by individuals who have not participated substantially in the matter in dispute, [to] aid in the resolution of differences by mutual agreement"⁷

3. Williams, *A Brief Look at the Armed Services Board of Contract Appeals*, 22 PUB. CONT. NEWSL. 3, 17 (1986) (1221 cases in 1979 grew to 2074 by the end of 1985).

4. See Spector, *The Contract Disputes Act of 1978—Some Observations and Predictions*, 39 FED. B.J. 1 (1980).

5. See, e.g., Crowell, Edelman, Henry, Lemley, Nash, Mandelman & Vander Schaaf, *Applying Alternative Dispute Resolution to Contract Claims*, 2 AM. U. ADMIN. L.J. 553, 554 n.7 (1987) [hereinafter *Applying ADR*] (statement of Eldon H. Crowell).

6. 124 CONG. REC. 36,264 (1978). This review would have been conducted at the request of the contractor by a high-level agency official who previously had not been involved in the claim. Although both the House and Senate draft versions contained this provision, it was dropped from the Act at the last minute. Senator Byrd explained that "[i]t is still the policy of Congress that contractor claims should be resolved by mutual agreement, in lieu of litigation, to the maximum extent possible. [The provision was dropped, however, because of concerns that] . . . contractors will use this statutory authority for a meeting with supervisors of the contracting officer to undermine the negotiating position of the contracting officer." *Id.* at 36,267.

7. 45 Fed. Reg. 31,035 (May 9, 1980); see also Federal Acquisition Regulation, 48

In this spirit, a few agencies began experimenting in the mid-1980s with several alternative means of dispute resolution, including minitrials, mediation, and settlement conferences. Consistent with the goals of the CDA, these methods have proven to be efficient and fair ways to resolve a variety of contractual and other private disputes. One significant factor which has helped agencies to accomplish this result is the involvement of the actual decision-makers, rather than their representatives, in the conflict resolution process.

Part I of this study surveys the growth of government contract appeals from a historical perspective and highlights the current rules applicable to resolving contract disputes. Part II focuses on the actual and potential application to contract appeals of the most commonly used ADR methods, particularly the minitrial, and also mediation, settlement judges, arbitration, dispute review boards, summary procedure, and case management. For each method, the advantages and disadvantages are analyzed and examples are given. Part III of this study analyzes the implementation of ADR in government contract appeals, and points to various changes that must occur in agency policies, rules, and contract statutes to make ADR an effective option for the speedy disposition of contract appeals.

This study is not intended to reverse the recent trend toward judicialization, but rather to explore the uses of one possible set of options available to help reduce the formality of some proceedings. Even given the impressive success rate in the relatively few cases to date which have used ADR, it would be naive to suggest that ADR methods are panaceas or that they will work in most contract appeals. Their use presents serious, unresolved issues in some cases. Nevertheless, we can benefit from examining agencies' experiences, describing what happened and why, exploring some of the practical and legal questions raised, and recommending procedures to make life easier and more productive for those who do choose to engage in ADR.

I. CONTRACT APPEALS: A BRIEF LOOK AT THE LANDSCAPE

A. *Background: The Growth of Contract Appeals*

Today's system for handling contract disputes has its origins in much earlier times in which the problems and processes were simpler. In 1855, the first general legislation was enacted that permit-

C.F.R. § 33.204 (1988) (stating "Government's policy to try to resolve all contractual issues by mutual agreement at the contracting officer's level, without litigation").

ted monetary claims against the federal government in a newly created Court of Claims.⁸ During the Civil War, Secretary of War Simon Cameron appointed what was probably the first board to hear contract claims. The function of this board was to hear and decide certain claims under ship construction contracts awarded by a chief quartermaster who was found to have committed fraud against the government.⁹ Subsequently, many government contracts explicitly allowed contractors to appeal a government contract official's decision to the agency head.¹⁰

In the aftermath of the First and Second World Wars, the first formal appeal procedures were established. In 1918, a Board of Contract Adjustment was established in the War Department. This Board, comprised of seven army officers and fifteen eminent civilian attorneys, was created to resolve contract disputes that had not been disposed of by mutual agreement.¹¹ In some of the cases which the Board resolved, trial-type hearings were conducted, complete with verbatim transcripts. Before dissolution early in 1922, this Board and its successor disposed of over three thousand cases.¹² Unlike Secretary of War Newton D. Baker, Secretary of the Navy Josephus Daniels was not a lawyer. Daniels took a considerably different approach by establishing a Compensation Board to avoid "conducting interviews and hearings which were taking considerable [amounts] of his time and patience."¹³ The Navy Board consisted of naval officers experienced in engineering, management, and ac-

8. The court (now the United States Claims Court) continuously has had jurisdiction over contract and other claims since its creation, first as a place of appeal from agency decisions, and now, more or less, on a par with the agency boards of contract appeals. Much of the early history described herein is set forth in considerable detail by Joel P. Shedd, Jr., *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 LAW & CONTEMP. PROBS. 39 (1964).

9. *Id.* at 42. The three-commissioner board went to the Western Military District, examined proofs of claims, and made recommendations to the Secretary on all claims in which payment had been suspended. *Id.* The Secretary's authority was upheld in 1868 when the Court of Claims refused to entertain a claim for the unpaid balance on the contractor's initial claim following payment of a part at the commissioners' recommendation. See *Adams v. United States*, 2 Ct. Cl. 70 (1866), *rev'd on other grounds*, 74 U.S. 463 (1868), which upheld the Secretary's authority to appoint a board, with the proviso that claimants had the option whether or not to consent to use a board.

10. Shedd, *supra* note 8, at 44.

11. *Id.* at 45. Civilian members' salaries were \$7,500 per year, then equal to those of senators and congressmen, and more than judges of the Court of Claims received. *Id.* at 45-46.

12. According to Professor Wigmore, the Board's opinions were "models of clarity." J. WIGMORE, EVIDENCE § 4(c), at 74 (3d ed. 1940).

13. Shedd, *supra* note 8, at 46-47 (quoting the Report for Under Secretary of War dated May 28, 1942) (footnote omitted).

counting "with sufficient rank and experience to command the respect of senior officials or contractors."¹⁴ This Board of technical experts operated continuously until the Navy Department Board of Contract Appeals replaced it in 1944.¹⁵ This Board, in turn, ultimately was subsumed into the ASBCA in 1949.¹⁶

The number and size of government contracts continued to grow in the period following World War II, as did their importance to the nation's economy. Additional agencies began establishing boards both to lighten the burden on top officials and to give contractors an option of avoiding the cost and delay of litigation in the courts. By the early 1960s, without any authorizing legislation, nearly a dozen agencies had created boards.¹⁷

Until the early 1960s, proceedings before the BCAs were informal and relatively expeditious.¹⁸ In most cases, there was little or no discovery, and the hearings that were conducted more closely resembled the model of arbitrations than court trials. Members of the government contracts bar usually presented a scaled-down version of their case before the boards. The assumption underlying this strategy was that if the contractor lost at the board level, he or she would be able to obtain a full-scale de novo trial on the merits before the United States Court of Claims.¹⁹

In 1963, the Supreme Court put a halt to this practice with its decision in *United States v. Carlo Bianchi & Co.*²⁰ The Court held that findings of fact by a BCA on disputes arising under a government contract were final and binding, subject only to judicial review on the administrative record in the Court of Claims.²¹ The Court ruled that a de novo hearing on the merits would no longer be available in the Court of Claims, no new evidence would be received or considered, and the boards were thus the sole forum for trying disputes arising under the remedy-granting clauses of the contract.²² The Court reaffirmed this conclusion in *United States v. Utah Construction*

14. *Id.* at 47.

15. *Id.* at 56.

16. For a detailed look at the creation of the Armed Services Board of Contract Appeals (ASBCA), see *id.* at 50-60.

17. See ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, STATISTICAL DATA RELATING TO ADMINISTRATIVE PROCEEDINGS CONDUCTED BY FEDERAL AGENCIES, CLASSIFIED INDEX 78-79 (1962).

18. *Applying ADR*, *supra* note 5, at 554 n.7 (statement of Eldon H. Crowell).

19. *Id.*

20. 373 U.S. 709 (1963).

21. *Id.* at 713-18.

22. *Id.*; see Spector, *Is It "Bianchi's Ghost" or "Much Ado About Nothing"?*, 29 LAW & CONTEMP. PROBS. 87, 90 (1964).

& Mining Co.²³ In *Utah Construction*, the Court held that the Court of Claims would continue to be the exclusive forum for contractor claims based upon breach of contract.²⁴

In the wake of *Bianchi* and *Utah Construction*, the boards were left with no choice but to take on a far more significant role in the resolution of government contracts disputes. This led to pressure by the government contracts bar to "judicialize" procedures before the boards in an effort to obtain and guarantee procedural due process.²⁵ The hearings on the merits became more formalized and extensive.²⁶ This judicialization led to an increase in caseloads and backlogs, more heavily lawyered disputes, and the introduction and expansion of discovery and motions practice. More and more decisions took longer to be reached and read. Many applauded these trends as enhancing contractors' due process rights, while many other viewers decried them as inducing delay, bureaucratic irresponsibility, and litigation expenses.²⁷

Whatever the merits of the various viewpoints, the judicialized model of claims resolution ultimately prevailed. In 1978, Congress enacted the CDA, due in large part to agitation by some private bar and board members and a few court decisions finding broad due process rights.²⁸ Among other things, the CDA gave the boards a statutory basis for their existence, enhanced the independence and authority of board judges (as well as the finality of their decisions), and prescribed exclusive dispute resolution procedures.²⁹

B. *The Current Rules: The Contract Disputes Act*

1. *Background.* In 1978, Congress enacted the CDA³⁰ to bring greater consistency, fairness, and efficiency to the resolution of disputes arising out of government contracts.³¹ The legislation largely reflected the recommendations of the Commission on Government Procurement, a commission created by Congress in 1969 whose

23. 384 U.S. 394 (1966).

24. *Id.* at 420.

25. Spector, *Public Contract Claims Procedures—A Perspective*, 30 FED. B.J. 1, 5 (1971).

26. *Id.* at 8.

27. *Id.* at 6.

28. See *Applying ADR*, *supra* note 5, at 554 (statement of Eldon H. Crowell).

29. See *infra* text pp. 188-90.

30. 41 U.S.C. §§ 601-613 (1982 & Supp. V 1987).

31. See ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK (1985) [hereinafter ADM. PROCEDURE SOURCEBOOK]; see also J. CIBINIC, JR. & R. NASH, JR., GOVERNMENT CONTRACT CLAIMS 610-32 (1981); E. CROWELL, R. BOYD & W. JOHNSON, THE CONTRACT DISPUTES ACT OF 1978, at 1 (Fed. Pub. 1979).

function was to recommend improvements in the procurement process.³²

2. *Agency Procedures.* The statutory system established by the CDA is applicable to all executive branch agencies. It begins with the contracting officer, an agency official whose function is to enter into and administer government contracts.³³ Any claim arising out of a contract is to be presented to the contracting officer.³⁴ This creates a dual, potentially conflicting, role for the contracting officer: the contracting officer is not only to represent the government as a party to the contract, but also (subject to certain decisional safeguards) is to make the decisions on claims.³⁵ If the dispute is not resolved amicably, the CDA requires the contracting officer to issue a written decision on the claim. This decision must state both the reasons for the decision and inform the contractor of available appeal rights.³⁶

A contractor who is dissatisfied with a contracting officer's deci-

32. Efforts to pass contract disputes legislation began after the Commission on Governmental Procurement issued its final report and recommendations in 1973 and reached fruition in October of 1978. H.R. 11002 was introduced by Representatives Harris (D. Va.) and Kindness (R. Ohio) on February 20, 1978 and reported favorably by the House Judiciary Committee without hearings. (The Commission had held hearings on similar legislation the previous year). The House passed the bill on September 26, 1978. A similar Senate bill, S. 3178, was introduced by Senators Chiles (D. Fla.), Packwood (R. Ore.), Heinz (R. Pa.) and DeConcini (D. Ariz.) on June 7, 1978 and favorably reported, with amendments, by the Committees on Governmental Affairs and the Judiciary. The Senate took up floor consideration of the bill on October 12, agreeing to amendments that exempted the Tennessee Valley Authority from certain of the Act's requirements, added the requirement that claims of \$50,000 or more be certified, deleted a requirement that an informal settlement conference be afforded contractors, and changed the standard of judicial review of contract appeals board decisions from "clearly erroneous" to "substantial evidence," among other things. The Senate then passed H.R. 11002, amended to contain the amended provisions of S. 3178, and the House agreed to the Senate-passed version the next day.

Perhaps because it was passed quickly, at the end of the legislative session, the Contract Disputes Act (including the Senate Amendments to it) was not the subject of extensive debate. However, the Congressional Record for October 12 does include a brief explanation of the amendments agreed to on the floor.

ADM. PROCEDURE SOURCEBOOK, *supra* note 31, at 283 (citation omitted).

33. *Id.* at 281.

34. *Id.* at 281-82.

35. *Id.* at 282. The term "claim" is not defined, but includes disputes arising during contract performance (involving, for example, the interpretation of contract terms or requests for equitable adjustments to the contract price) and claims for breach of contract. It does not include bid protests or proceedings for the disbarment or suspension of government contractors. *Id.* at 281.

36. *Id.* at 282.

sion on the claim may appeal the decision either to an agency BCA or directly to the United States Claims Court. "At this stage of the dispute, a more formal adversary proceeding begins."³⁷ Following a second unsatisfactory result, the contractor may then appeal the decision of either body to the United States Court of Appeals for the Federal Circuit.³⁸

3. *Other Provisions.* In addition to establishing a single comprehensive law covering the contract disputes process for almost all government contracts, the CDA made several other important changes. For the first time the Act gave a statutory basis to the BCAs, expanded their jurisdiction, authorized them to grant any relief within the authority of the Claims Court,³⁹ and gave them subpoena power.⁴⁰ For the purpose of enhancing the quality and independence of the boards, the CDA added new requirements for the selection of contract appeals board members.⁴¹ It also directed the OFPP to issue guidelines for the establishment and procedures of agency contract appeals boards.⁴²

C. *Surveying the Disputes Landscape: Why, What, and How?*

1. *Why So Many Disputes?*—For a variety of reasons, the number and frequency of controversies that remain between the parties requiring resolution by BCAs has increased. These include:
—Historical reasons, such as the growing impact of government

37. *Id.*

38. *Id.* This court was established and given jurisdiction over contract appeals as well as certain other appeals involving the United States by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. Before passage of this law, the United States Court of Claims heard appeals from contract appeals board cases as well as original appeals from contracting officer's decisions.

39. 41 U.S.C. § 607 (1982).

40. *Id.* § 610.

41. *See id.* § 607(b).

The CDA requires contract appeals boards to provide for accelerated disposition of cases involving claims of \$50,000 or less. . . . (Jurisdiction of U.S. district courts over small claim contract disputes was eliminated.) These procedures are intended to encourage the use of the agency boards, rather than the Claims Court, for minor disputes.

ADM. PROCEDURE SOURCEBOOK, *supra* note 31, at 282.

42. 41 U.S.C. § 607(h) (1982). The model rules developed pursuant to this mandate appear in the *Administrative Procedure Sourcebook*, as do cites to individual boards' procedural rules. In addition, the Office of Federal Procurement Policy (OFPP) has issued a policy directive setting forth procedures for the handling of claims by agency contracting officers and the text of a disputes clause to be included in government contracts. OFPP Policy Letter 80-3, *reprinted in* ADM. PROCEDURE SOURCEBOOK, *supra* note 31, at 331.

contracting;⁴³ increased complexity of contracts; new auditing and other regulatory requirements; and an expanded notion—perhaps overexpanded—of necessary due process rights;

—More contractors have developed a dependence on the government for their existence;

—There is an increased willingness to resort to litigation among many contractors and an expanding government contracts bar;

—There is an increasing public division or controversy over the wisdom of some kinds of expenditures (*e.g.*, some defense spending) which often is vented peripherally in controversies over contract or administrative decisions;

—Increased scrutiny by many congressional sources may discourage contracting officers or their supervisors from risking close calls, taking on politically sensitive cases or handling “hot potatoes;”

—The establishment (or expansion) of intra-agency audit offices and inspectors general, and statutes or rules enhancing their authority, has served to inhibit settlement of disputes and limit decisional flexibility.

The combined result of these factors has been a reduced willingness or ability of contracting officials to exercise responsibility, and an increased doubt in some quarters that the contracting officers truly act to serve the government’s best interest.⁴⁴ One knowledgeable observer sees an environment “where management seems willing to throw their difficult problems into the litigation mill rather than work them out at a management level.”⁴⁵

Dissatisfaction with many agencies’ contracting processes and methods of dispute resolution is increasing.⁴⁶ The focus of much of

43. According to the Census Bureau, the dollar value of federal contracting rose by approximately \$66 billion (to \$196.3 billion) from 1981 to 1987. UNITED STATES BUREAU OF THE CENSUS, *FEDERAL EXPENDITURES BY STATE FOR 1987*, at 43 (1988).

44. See Bednar & Jones, *The DOD Contracting Officer*, 1987 A.B.A. SEC. PUB. CONT. L. 1; see also PRESIDENT’S BLUE RIBBON COMMISSION, *A Quest for Excellence*, FINAL REPORT BY THE PRESIDENT’S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT (June 1986) (recommending standards of conduct for defense contractors).

45. R. Nash, Jr., *A New Technique for Settling Disputes—The “Mini Trial”* (1985) (unpublished manuscript) (copy on file with *Maryland Law Review*).

46. In 1966, one knowledgeable observer commented, “[i]n recent years contractor complaints of delay in receiving ASBCA decisions were rare indeed.” Shedd, *supra* note 8, at 60. An understated view two decades later held that “in the past few years the [dispute resolution] process seems to have been gradually slowing down.” R. Nash, *supra* note 45; see also letter from David Schwartz, Director, Multinational Legal Services (MLS), to Robert B. Bedell, Administrator, OFPP (Mar. 31, 1987) (“Litigated contract

this dissatisfaction is on the various BCAs to which agencies and contractors turn after failing to resolve their disputes. Many of the broad criticisms are unreflective, and one should bear in mind that judges, boards, caseloads, and work habits vary enormously. The unhappiness among many contractors, lawyers, and agency officials, nevertheless, is based upon accurate perceptions that these disputes often are unnecessarily contentious and their resolution needlessly complex, drawn out, and, therefore, very costly to both sides.

2. *What Kinds of Cases?*—Because all acquisition disputes under agency programs involve contracts, they are far more homogeneous than are cases before the federal district courts. While each agency, with its unique program assortment, board, and caseload, has its own characteristics, generalizations as to typical contract disputes may be helpful. For example, the Veterans Administration Board of Contract Appeals handles primarily claims and disputes arising under construction contracts for VA hospitals. The Army Corps of Engineers Board (Corps BCA) processes domestic and international construction disputes arising under Corps contracts. The largest board, the ASBCA, decides a wide range of Department of Defense (DoD) procurement disputes. These disputes often include resolving technical issues regarding specifications for state-of-the-art equipment, engineering issues arising under construction contracts, and complex accounting issues associated with claims by the government under the Truth in Negotiations Act.⁴⁷ Similar to the Corps BCA, the ASBCA also hears appeals on behalf of other agencies. The General Services Board of Contract Appeals (GSBCA) has jurisdiction not only over disputes arising out of GSA supply schedule contracts, but also appeals under contracts for automatic data processing equipment pursuant to the Brooks Act.⁴⁸ Under the Competition in Contracting Act of 1984,⁴⁹ the GSBCA has jurisdiction to resolve bid protests brought by disappointed bidders under federal automatic data processing contracts.

3. *How?—BCAs and Their Procedures.*—The boards, their rules, and the matters that they decide hardly are uniform, but they do

disputes have, to put it bluntly, all but swamped the overburdened boards of contract appeals and the U.S. Claims Court. Complaints of long delays, with attendant severe client hardships, are heard frequently.”) (copy on file with *Maryland Law Review*).

47. See 10 U.S.C. § 2306 (1988).

48. 40 U.S.C. § 759 (1982).

49. Pub. L. No. 98-369, 98 Stat. 1175 (codified at scattered sections of the U.S.C.).

have enough in common that the following description is broadly illustrative.

Pursuant to authority granted by section 8(h) of the CDA,⁵⁰ the OFPP at the Office of Management and Budget (OMB) has promulgated proposed uniform rules of procedure for the BCAs.⁵¹ The boards generally have adopted these uniform rules, although each board has made minor modifications to suit its type of cases and caseload.⁵² For example, the procedures followed by the ASBCA are a combination of statutory provisions under the CDA and the proposed uniform rules. They are as follows:

Appeals. If a contractor wishes to appeal the final decision of the contracting officer, the contractor must file with the ASBCA written notice of appeal within ninety days of receipt of the decision.⁵³

Appeal File. Within thirty days of receipt of the appeal, the contracting officer must file with the ASBCA pertinent documents relating to the dispute. These documents include the contracting officer's final decision, the contract and specifications, pertinent correspondence, and other relevant documents.⁵⁴ The final collection of all of these documents is commonly referred to as the "Rule 4 File."

Complaint. Within thirty days of docketing the appeal by the ASBCA, the contractor must file the complaint setting forth the basis for and amount of the claim.⁵⁵ The government's answer is due within thirty days after receipt of the complaint.⁵⁶

Written Discovery. The ASBCA encourages cooperation between the parties in exchanging written and documentary discovery.⁵⁷ The ASBCA rules provide that responses to interrogatories, requests for admission, and requests for production of documents are due within forty-five days after service.⁵⁸

Depositions. The ASBCA's rules do provide for depositions.⁵⁹ The deposition practice before the ASBCA has become nearly as extensive as in typical court litigation.

50. 41 U.S.C. § 607(h) (1982).

51. See OFFP Rules of Procedure, Cont. App. Dec. (CCH) ¶¶ 101-110.

52. E. CROWELL, R. BOYD & W. JOHNSON, *supra* note 31, at 61.

53. 41 U.S.C. § 606 (1982).

54. ASBCA Rules of Practice 4, Cont. App. Dec. (CCH) ¶ 185.50.

55. ASBCA Rules of Practice 6(a), Cont. App. Dec. (CCH) ¶ 185.70.

56. ASBCA Rules of Practice 6(b), Cont. App. Dec. (CCH) ¶ 185.70.

57. ASBCA Rules of Practice 14(a), Cont. App. Dec. (CCH) ¶ 186.90.

58. ASBCA Rules of Practice 15, Cont. App. Dec. (CCH) ¶ 187.

59. ASBCA Rules of Practice 14, Cont. App. Dec. (CCH) ¶ 186.90; *see also* 41 U.S.C. § 610 (1982).

Subpoenas. Pursuant to section 11 of the CDA, the ASBCA has the power to issue subpoenas compelling testimony in deposition or at trial.⁶⁰ Further, subpoenas may be issued compelling the production of documents.⁶¹

Hearings. Hearings are conducted before one ASBCA member and a written transcript of the hearing is produced. Rule 20 of the ASBCA provides that hearings "shall be as informal as may be reasonable and appropriate under the circumstances."⁶² The ASBCA's rules do refer to the Federal Rules of Evidence, but admissibility of evidence is left to "the sound discretion of the presiding administrative judge."⁶³

Decisions. After the hearing, the parties customarily submit simultaneous post hearing briefs.⁶⁴ The ASBCA then issues a decision in writing signed by the ASBCA member who conducted the hearing and the other members of his or her panel.⁶⁵

Small Claims. For claims under \$50,000, the ASBCA's rules provide for an accelerated procedure so that the decision will be rendered within 180 days of the notice of appeal.⁶⁶ For claims under \$10,000, the ASBCA offers an even more streamlined "expedited" procedure so that the decision will be rendered within 120 days.⁶⁷

II. ALTERNATIVES FOR RESOLVING CONTRACT APPEALS

A. Will ADR Work?

While the widespread dissatisfaction over the growth and consequences of contract disputes is obvious, solutions to the existing problems are not. Several remedies have been recommended for dealing with the problems encountered. Some of the suggestions include marginal revisions of the boards,⁶⁸ increased professionalization of contracting officers, and overall structural changes in the ways in which agencies conduct business. Some believe that it makes much more sense to have one board, or at most two (one

60. 41 U.S.C. § 610 (1982).

61. *Id.*

62. ASBCA Rules of Practice 20, Cont. App. Dec. (CCH) ¶ 187.50.

63. *Id.*

64. See ASBCA Rules of Practice 23, Cont. App. Dec. (CCH) ¶ 187.70.

65. ASBCA Rules of Practice 28, Cont. App. Dec. (CCH) ¶ 188.30.

66. ASBCA Rules of Practice 12.1(b), Cont. App. Dec. (CCH) ¶ 186.40.

67. ASBCA Rules of Practice 12.1(a), Cont. App. Dec. (CCH) ¶ 186.40; see also 41 U.S.C. § 608(a) (1982).

68. See Churchill, *Report of the Federal Contract Claims and Remedies Committee on Ways of Expediting Appeals Before the Board of Contract Appeals*, 16 PUB. CONT. L.J. 161, 177-78 (1986) (recommending that the boards hire more judges and support staff).

military—ASBCA, and the other civilian), than to have many small ones.⁶⁹ While these proposals may have some merit, this study will not discuss them.

The cluster of methods that have come to be known as “alternative means of dispute resolution” are regarded by many people within and without of the government contracts community as particularly appropriate means of resolving many questions that arise in government contract claims.⁷⁰ While some see ADR as merely a “fad” and question its specific utility in government disputes,⁷¹ these methods have helped and continue to successfully help resolve private conflicts which raise questions similar to those heard by BCAs. This study’s main contention is that it is time for all major contracting agencies, and those individuals who deal with them, to explore seriously the potential uses for ADR, and to begin creating an atmosphere in which these methods can be more readily employed. Before specific issues involved in the integration of ADR methods into the government contracting process are addressed, it is necessary to decide whether they are worth the effort. The answer is not obvious to everyone. Skeptics have raised concern over agencies’ use of some ADR processes. These skeptics worry that ADR will reduce the accountability of government officials for their decisions. Some of them fear that widespread use of ADR merely will add another layer of “time-consuming and wasteful techniques in return for minimal (if any) reductions in the alleged delay and cost of resolving a relatively small number of contract disputes.”⁷² A judge similarly expressed concern that resolving many disputes

69. See E. CROWELL, R. BOYD & W. JOHNSON, *supra* note 31, at 52.

70. E.g., Korthals-Altes, *The Applicability of Alternative Dispute Resolution Techniques to Government Defense Contract Disputes*, reprinted in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION 147 (1986) [hereinafter ADR SOURCEBOOK]; letter from David Schwartz to Robert B. Bedell, *supra* note 46 (“Among all the disputes to which the Government is a party, contract disputes are perhaps the most appropriate for resolution by ADR. . . . [C]ontract disputes are primarily disputes about money, more or less involving disputed facts . . . with few questions of credibility of witnesses ADR is the future of government contract litigation.”).

71. For the various arguments concerning alternative means of dispute resolution (ADR), see ADR SOURCEBOOK, *supra* note 70, at 77, 101; Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986).

72. Letter from Stuart Schiffer, Deputy Assistant Attorney General, Civil Division, Department of Justice, to Marshall J. Breger, Chairman, Administrative Conference (Nov. 13, 1987) (copy on file with *Maryland Law Review*). One need not be a skeptic to recognize that ADR is “one of those subjects that receives almost universal endorsement in theory but substantially less in practice.” Millhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, 3 NEGOTIATION J. 29, 29 (Jan. 1987).

through ADR will produce no precedent which may, in turn, undermine the predictability that aids the government's competitive bidding system, heighten contract costs, and increase uncertainty and disputes.⁷³ A few even maintain that a system that shifts the majority of potentially controversial or difficult decisions to judges, accountants, technicians, or others who are involved less directly in managing government contracts, is, and should be, preferred by agency officials.

Two crucial questions are presented. First, do these concerns loom so large as to render ADR ineffective or harmful and thus unsupportable in contract claims? Second, how can these concerns be mitigated in practice without sacrificing the unique aspects that make ADR valuable?

Many knowledgeable observers have remarked on government's potential uses of ADR.⁷⁴ The Administrative Conference, for instance, has studied issues in governmental dispute resolution and repeatedly has recommended that agencies make greater use of mediation, negotiation, minitrials, and similar means to reduce the delay and contentiousness which needlessly accompany many agency decisions.⁷⁵ The Conference has twice formally called for legislation which authorizes agencies to agree to use voluntary, binding arbitration in limited classes of contract and other disputes.⁷⁶ Numerous articles and reports, including several prepared for the Conference, have demonstrated that mediation, negotiated rulemaking, and similar methods have produced sound agency decisions while at the same time avoiding much of the formality and cost

73. Letter from Judge John Corcoran, Veterans Administration Board of Contract Appeals (VABCA), to Marshall J. Breger, Chairman, Administrative Conference (Nov. 16, 1987) (copy on file with *Maryland Law Review*).

74. "In the long term, lawyers, particularly government lawyers, must de-emphasize their adversarial behavior and give greater weight to solving and negotiating. A central challenge of the legal profession is to resolve controversies before they escalate into major disputes or proceed to a full hearing." Burns, *A View From the Justice Department*, 2 AM. U. ADMIN. L.J. 441 (1987); see also Hatch, *A View From Congress*, 2 AM. U. ADMIN. L.J. 427 (1987); Smith, *Alternative Means of Dispute Resolution: Practices and Possibilities in the Federal Government*, 1984 MO. J. DISPUTE RESOLUTION 9, reprinted in ADR SOURCEBOOK, *supra* note 70, at 163.

75. See 1 C.F.R. § 305.86-3 (1989) (recommending use of a variety of ADR methods on a voluntary basis); *id.* §§ 305.82-4, .85-5 (recommending procedures for negotiated rulemaking); *id.* § 305.84-4 (EPA should emphasize negotiation in CERCLA hazardous waste site cleanups); *id.* § 305.82-2 (informal action should form the core of federal grant dispute resolution).

76. *Id.* §§ 305.87-5, .86-3. These regulations also address procedural safeguards and appropriate subjects for agency arbitrators.

of standard processes.⁷⁷ The agency officials who have first hand experience with ADR,⁷⁸ and others who have been involved, have exhibited considerable enthusiasm. Outside the governmental context, testimonials to ADR's applications have become so commonplace that some worry about overselling it.⁷⁹ More importantly, many government contract cases resemble those others in which ADR has been applied successfully.⁸⁰ Even recognizing that most of

77. See A. ADAMS & J. FIGUEROA, EXPEDITING SETTLEMENT OF EMPLOYEE GRIEVANCES IN THE FEDERAL SECTOR: AN EVALUATION OF THE MSPB'S APPEALS ARBITRATION PROCEDURE (Jan. 1985) (report to the Administrative Conference); G. BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE (1986); Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261; Barrett, *Mediation and Adjudication: The Double Track Approach*, 30 FED. B. NEWS & J. 436 (1983), reprinted in ADR SOURCEBOOK, *supra* note 70, at 527; Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 165 (1986), sections reprinted in ADR SOURCEBOOK, *supra* note 70, at 239, 309, 437, 593, 625; Perritt, *Analysis of Four Negotiated Rulemaking Efforts*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 637 (1986); Smythe, *The Reparations Program of the Commodity Futures Trading Commission: Reducing Formality in Agency Adjudication*, 2 AM. U. ADMIN. L.J. 39 (1987).

78. See *Applying ADR*, *supra* note 5, at 563-66, 571-73 (remarks of Jack K. Lemley, Ralph H. Nash, and Derek J. Vander Schaaf); Edelman & Carr, *The Mini-Trial: An Alternative Dispute Resolution Procedure*, 42 ARB. J. 7 (1987), reprinted in ADR SOURCEBOOK, *supra* note 70, at 231; Harter, *Dispute Resolution and Administrative Law: The History, Needs and Future of a Complex Relationship*, 29 VILL. L. REV. 1393 (1983-84), reprinted in ADR SOURCEBOOK, *supra* note 70, at 119; Office of the Inspector General, DoD, *Tennessee-Tombigbee Claim Settlement* [hereinafter *Tenn-Tom Claim Settlement Report*] (report of investigation July 29, 1987), reprinted in ADR SOURCEBOOK, *supra* note 70, at 583; R. Nash, *supra* note 45.

79. See Rich, *Alternative Dispute Resolution: Opening Doors to Settlement*, CHEM. WEEK, Aug. 14, 1985, at 28, reprinted in ADR SOURCEBOOK, *supra* note 70, at 71; Millhauser, *Rush to Mediation: Where Is the Bandwagon Going?*, Legal Times, Aug. 10, 1987, at 16 (as clarified, Aug. 17, 1987); *The Effectiveness of the Minutrial in Resolving Complex Commercial Disputes: A Survey*, REPORT OF SUBCOMMITTEE ON ALTERNATIVE MEANS OF DISPUTE RESOLUTION, COMMITTEE ON CORPORATE COUNSEL, AMERICAN BAR ASSOCIATION SECTION OF LITIGATION, July 1, 1986 [hereinafter ABA SUBCOMMITTEE REPORT], reprinted in ADR SOURCEBOOK, *supra* note 70, at 253.

80. Speaking generically of litigation, an experienced observer pointed out:

[A]n attorney or his client tend to advance an argument or an offer as an absolute fixed quantity that cannot change. The position is important to a party, representing the merger of all prior principles and emotions in a case. When the adversary advances a contrary position, the first party sometimes feels threatened and besieged and defensively advances the same position with more argument to overcome the opponent by will, strength, and coercion. One becomes afraid to make a concession which he thinks will be viewed as a sign of weakness and generate demands for more concessions. Further aggression ensues. The other party also reacts in the same manner. Emotions take over and each side may lose sight of a realistic objective evaluation of a case. Consequently effective communication stops and each side points its position at the other sometimes with great hostility. The legal combat continues and escalates.

this evidence is anecdotal, observation and common sense suggests that a closer look at the possibilities of these methods in government contract disputes should be taken.

Moreover, some empirical evidence of ADR's effectiveness in contract cases does exist. As illustrated by the next section of this study, experience to date shows that these methods have been implemented successfully in contract disputes. While some critics may claim that, at this point, proof of the benefits of these methods is less than scientific, these case studies show that ADR is effective for cutting cost and delay in some instances.⁸¹

The adoption of limited policies or rules, combined with efforts to enhance awareness, receptivity, and training, hardly have amounted to a major shift in the way contract claims are handled. The concerns which have been raised can be met by careful attention when integrating ADR into the contract system at the point at which conflicts tend to arise. They can be remedied through enlightened administration and oversight. Because ADR clearly should not be seen as susceptible to producing outcomes that are unreviewable, unfair, or not in public interest, accountability issues deserve close attention. This study later examines in greater detail the methods employed to ensure defensible ADR decisions.⁸² For now, we begin the consideration of the merits of ADR by expressing confidence that guidelines can be developed for ADR which emphasize the need for flexibility without compromising the necessary accountability. Even without ADR, agency contracting officials already routinely negotiate over the award and adjustment of tens of thousands of contracts, pursuant to guidance on documentation that generally is viewed as adequate. Settlement negotiations, in the context of a dispute, generally deal with issues that are the same as, or analogous to, those issues which typically arise in negotiating or amending contracts. The mere existence of a formal dispute should not render suspect a settlement worked out by the parties. This conclusion is particularly sensible in light of the fact that a sizeable percentage of contractor claims at the contracting officer and BCA

Martin, *Eighth Circuit Court of Appeals Pre-Argument Conference Program*, 40 J. Mo. B. 251, 254, col. 2 (1984).

81. Every agency minitrial except one has avoided years of litigation and a full-fledged hearing, while producing outcomes that appear to have satisfied nearly every party who took part. Even in the one Navy case in which a settlement was not produced, ADR significantly narrowed the issues and reduced the hearing burden. While these data fall short of absolute, scientific certitude, they do demonstrate the worth of these methods in at least some contract disputes.

82. *See infra* pp. 213-15.

levels already are disposed of consensually. As with other kinds of negotiations, adequate guidance can, and should be provided on the degree of documentation appropriate to justify settlements reached via ADR.

Critics also worry that ADR merely will add more procedures, tie up busy executives, and bog down BCA judges who should be concentrating on decisions that will reduce the considerable backlogs which exist and set precedents to avert disputes in the future. Not every case, or even most cases, however, will be appropriate for ADR. Rather, in most cases, ADR will not be a factor. Second, many agency officials at various levels can serve as principal negotiators. It would be inaccurate to suggest that only the agency head or other busy high-ranking officials possess the necessary qualifications. Third, while some disputes will need judicial attention—especially those which present a new or important question in construing a basic statute or regulation—such cases clearly do not predominate and by most accounts are not numerous.⁸³ To the extent that these precedent-setting cases do occur, ADR ultimately will allow a BCA to focus more attention on them by taking a little judicial time early in other, less important cases to avoid lengthy discovery or hearings. The benefits of active judges using ADR and related case management techniques in federal courts have been shown.⁸⁴ Though some doubts as to the notion of the “managerial judge” have been expressed,⁸⁵ the recent, near-continuous rise in the ratio of filings per BCA judge indicates that in the long run, BCAs inevitably will need to take added steps to encourage expeditious processes for reaching acceptable decisions.

While there will be occasions when ADR is inappropriate, parties, including agencies, can be expected to act in their enlightened self-interest to avoid the uncertainty that would interfere with planning and to refrain from resorting to ADR when it is likely to be meaningless. Moreover, BCA judges and other agency officials can be expected to oversee the use of ADR methods in ways that allow problems to be raised and remedied as they occur. Thus, for all of these reasons, many of the concerns expressed seem overdrawn.

83. *E.g.*, letter from David Schwartz, Director, MLS, to Marshall J. Breger, Chairman, Administrative Conference (Nov. 16, 1987) (copy on file with *Maryland Law Review*).

84. *E.g.*, A. ADAMS & J. FIGUEROA, *supra* note 77; Cappalli, *Model for Case Management: The Grants Appeals Board*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 663 (1986); Smythe, *supra* note 77.

85. *E.g.*, Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

The ultimate questions on ADR use primarily do not involve accountability, resources, or efficiency.

Most skeptics even would agree that there are procurement cases in which ADR can help and should be used. Most even agree that some training in ADR skills would help BCA judges and other participants recognize apt cases and settle them. Such modest steps are worthwhile if only for the prospect of marginal improvements. Whether ADR methods can succeed fully, as they have in certain areas, will depend on whether agency officials, those who deal with them, and congressional and other overseers eventually perceive consensual decisions which are reached by a person directly responsible as both possible and often preferable to those delegated to nonaccountable individuals. If so, then there exists no reason why ADR cannot work as well with government contract disputes as it has in other contexts.

We now turn to a closer look at the innovative methods that have been, or might be, employed.

*B. Minitrial*⁸⁶

1. *General.*—Of all the ADR methods discussed, the minitrial has been both the most often used in major contract claims and the most written about. The “minitrial” is not really a trial at all. Rather, it is a structured settlement process in which each side presents a highly abbreviated summary of its case to senior officials of each party who are authorized to settle the case.⁸⁷ Following the presentations, the officers seek to negotiate a settlement. The minitrial combines aspects of several alternative means of dispute resolution to create an informal settlement procedure which retains many of the features of adversary litigation. Several agencies have adopted minitrial policies.⁸⁸ Although the approaches are slightly different, there are certain common elements. Perhaps most important, the parties must reach a pre-minitrial agreement in which the ground rules for the minitrial are set forth, including the specific time limits for each stage of the minitrial.⁸⁹ The parties generally

86. Some portions of this section (*e.g.*, principals, other participants, neutrals, and rosters) will be pertinent to other devices discussed.

87. Edelman & Carr, *supra* note 78, at 9, *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 233.

88. These include the National Aeronautics and Space Administration (NASA), the United States Army Corps of Engineers (the Corps), the Department of the Navy, and the Department of Energy. See ADR SOURCEBOOK, *supra* note 70, at 701-853.

89. Edelman & Carr, *supra* note 78, at 12, *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 236.

agree to curtail discovery. They also impose a limit of typically one or two days for the minitrial hearing, followed by a more flexible limit for the negotiations.

The parties each designate one or occasionally two principals to represent them at the minitrial. These principals, who usually have not been involved previously in preparing the case for litigation, typically are high level officials with full authority to settle the dispute. The parties also have the option of choosing a neutral advisor to help run the minitrial and advise them on technical or legal issues.⁹⁰ The neutral should have a legal, and ideally, a technical background in the area of dispute.

At the minitrial, counsel for each party presents the party's case to the principals (and perhaps a neutral advisor) in any way counsel chooses.⁹¹ This may include oral argument, examination of witnesses, documentary evidence, films, photos, or other exhibits. The rules of evidence do not apply. The principals may ask questions of both attorneys and witnesses. The time limit imposed upon a party presenting its case is the limit self-imposed in the pre-minitrial agreement.⁹²

Once the hearing stage of the minitrial is completed, the principals and, with consent, the neutral meet privately without the attorneys to negotiate. The role of the neutral is dependent completely on the wishes of the principals. The neutral may mediate the discussions, give legal or technical advice when asked, or even propose settlement terms. The principals generally have auditors or other legal and technical advisors available for consultation, but conduct the negotiations themselves. No transcript is made of the proceedings. If the minitrial does not lead to a settlement, litigation will be resumed and no reference will be made to the settlement attempts or to the evidence presented at the minitrial.⁹³

There are many advantages to using a minitrial proceeding to resolve government contract disputes.⁹⁴ Some are worth mentioning briefly here. Preparing and completing a minitrial can take as little as a month as opposed to the two to four years required for litigation. The saving of personnel time, attorneys' fees, hearings, discovery burdens, and opportunity costs are obvious. Because the majority of contract disputes involve questions of fact (or, at a mini-

90. *Id.* at 11, reprinted in ADR SOURCEBOOK, *supra* note 70, at 235.

91. *Id.* at 10, reprinted in ADR SOURCEBOOK, *supra* note 70, at 234.

92. *Id.* at 8, reprinted in ADR SOURCEBOOK, *supra* note 70, at 232.

93. *Id.* at 13-14, reprinted in ADR SOURCEBOOK, *supra* note 70, at 237-38.

94. See *infra* text pp. 208-09.

mum, mixed questions of law and fact), it is more sensible for high level management officials to hear summary presentations and negotiate a settlement using good business judgment than it does for lawyers to litigate the facts for weeks or months in a hearing. For those who feel that justice is served more readily in an adversarial system than in a conciliatory one, the minitrial retains the best of the adversarial presentations without the time-consuming rules of evidence and procedure. Finally, the minitrial, like arbitration and mediation, removes the case from the BCA's docket and permits the judges to focus on those cases that are unseizable.

Like any ADR procedure, the minitrial does have its drawbacks and uncertainties. For example, the pre-minitrial agreement regarding time limits must be enforced strictly, especially for discovery, or else the process may still take too long. Also, if only one party participates in good faith, if the government is not willing to give its principal full authority to settle, or if another investigation follows the minitrial, the process may be doomed to failure. Other issues which complicate the use of the minitrial include the stage of the litigation at which the minitrial should be introduced, who should be the government's principal, what role the BCA should play in overseeing or participating in the minitrial, and what procedures should be used in the minitrial itself.

2. *Minitrial Initiatives to Date.*—Four agencies—the National Aeronautics and Space Administration (NASA), the United States Army Corps of Engineers (the Corps), the Department of the Navy, and the Department of Energy—have experimented successfully with using minitrials to resolve contract disputes.⁹⁵ By 1987, of a total of eleven cases submitted to minitrial by these four agencies, nine had been settled and one was ongoing.⁹⁶ In addition, the Corps of Engineers, the Department of Justice Commercial Branch, and the Navy have formal minitrial policies, while the Environmental Protection Agency (EPA) and the Claims Court have promulgated ADR guidance.⁹⁷ The experiences of these agencies form the basis of most of this study.

a. *NASA.* In 1982, NASA conducted the first minitrial ever engaged in by the government. In 1979, Spacecom and TRW filed a claim to resolve a complex technical dispute concerning whether

95. See ADR SOURCEBOOK, *supra* note 70, at 701-853.

96. See *id.* at 229-52, 573-93, 701-852. Unfortunately, more recent statistics are not available.

97. See *id.* at 701-853.

certain requests by NASA were included in a contract or were changes to it.⁹⁸ The parties suspended the litigation for three months shortly after discovery and began to conduct settlement discussions.⁹⁹ These, however, failed and by 1981, after the parties had engaged in lengthy discovery, trial was still estimated to be at least a year away.¹⁰⁰ At this point Spacecom proposed that they engage in a minitrial to resolve the dispute. The minitrial hearing lasted only one day, and the parties settled for over one hundred million dollars on the second day of negotiations.¹⁰¹ Although NASA is a proponent of minitrials, it has not used the minitrial device since 1982, and currently does not have a formal ADR policy.

b. *Army Corps of Engineers*. By 1984, the Corps became interested in experimenting with minitrials and conducted its first minitrial in December of that year. The result was the settlement of a \$630,000 claim for \$380,000.¹⁰² Only six months later, the Corps conducted a minitrial to settle a forty-three million dollar claim involving a 1979 contract to excavate eleven miles of the Tennessee-Tombigbee waterway. Even though Corps officials were skeptical that the minitrial would resolve the dispute, the parties settled for \$17.2 million after a total of 4 days of hearings and 2 days of negotiations spread out over 2 weeks.¹⁰³ The claim of Tenn-Tom, the contractor, was opposed vehemently by district level personnel within the Corps. More significantly, the settlement was criticized as being too generous.¹⁰⁴ A disgruntled Corps employee, claiming that the case was too complex to settle in just a few days, accused the Corps of incompetence.¹⁰⁵ This prompted an investigation into the minitrial by the DoD Inspector General. A year after the mini-

98. Johnson, Masri & Oliver, *Minitrial Successfully Resolves NASA-TRW Dispute*, Legal Times, Sept. 6, 1982, at 13, reprinted in ADR SOURCEBOOK, *supra* note 70, at 573.

99. *Id.*

100. *Id.*

101. For a discussion of this case and issues raised, see Parker & Radoff, *The Mini Hearing: An Alternative to Protracted Litigation of Factually Complex Litigation*, 38 BUS. LAW. 35 (1982).

102. Memorandum on Alternative Dispute Resolution Update from Frank Carr and Sabrina Simon, Department of the Army, Corps of Engineers (Mar. 20, 1987) [hereinafter Alternative Dispute Resolution Update], reprinted in ADR SOURCEBOOK, *supra* note 70, at 587.

103. Edelman & Carr, *supra* note 78, at 14, reprinted in ADR SOURCEBOOK, *supra* note 70, at 238.

104. See Navy to Evaluate its ASBCA Cases for Possible Alternative Dispute Resolution, 47 Fed. Cont. Rep. (BNA) 341, 342 (Mar. 2, 1987), reprinted in ADR SOURCEBOOK, *supra* note 70, at 589, 590.

105. *Drop in Minitrials Analyzed at ABA Meeting* (excerpt), 46 Fed. Cont. Rep. (BNA) 353 (Aug. 25, 1986), reprinted in ADR SOURCEBOOK, *supra* note 70, at 581.

trial, the Inspector General released his report. This report endorsed the Tenn-Tom minitrial process and concluded that the claim was "reasonably settled in the best interest of the Government."¹⁰⁶ It, however, also recommended that the Corps document its procedures better in the future.¹⁰⁷

After the Tenn-Tom minitrial, the Corps issued its first formal circular that provided guidance on the use of minitrials.¹⁰⁸ Under these guidelines, Division Engineers¹⁰⁹ were given the responsibility to select cases appropriate for minitrial.¹¹⁰ Further, these guidelines required the Chief Trial Attorney to be notified only when a minitrial had been offered to the contractor.¹¹¹ The individuals involved in the minitrial were to be as follows: the government principal—the Division Engineer, the contractor's principal—a senior management official with settlement authority, and the neutral—an impartial third party with experience in government contracting and litigation.¹¹² The circular further outlined the procedures to be followed when drafting a minitrial agreement and conducting the hearing and negotiations.

The Corps' South Atlantic Division has employed ADR once. The North Atlantic Division also conducted a minitrial,¹¹³ and once conducted a variation of its review board procedure.¹¹⁴ This most

106. *Tenn-Tom Claim Settlement Report*, *supra* note 78, reprinted in ADR SOURCEBOOK, *supra* note 70, at 586.

107. *Id.*

108. See Department of the Army, Corps of Engineers, Circular on Alternative Dispute Resolution: Minitrials (Sept. 23, 1985) [hereinafter Circular on ADR], reprinted in ADR SOURCEBOOK, *supra* note 70, at 703. For summary of agency policies, see Edelman, *ADR at the U.S. Army Corps of Engineers*, in CONTAINING LEGAL COSTS: ADR STRATEGIES FOR CORPORATIONS, LAW FIRMS, AND GOVERNMENT 273 (CPR Legal Program 1988) [hereinafter CONTAINING LEGAL COSTS]; Flaherty, *The Mini-Trial Policy of the Department of Justice*, in CONTAINING LEGAL COSTS, *supra*, at 325; Turnquist, *ADR Initiatives at the Department of the Navy*, in CONTAINING LEGAL COSTS, *supra*, at 305; *Claims Court Approves ADR for Complex Federal Cases*, 5 ALTERNATIVES TO HIGH COST LITIGATION 137 (Sept. 1987).

109. The Corps is a decentralized organization. The headquarters and Chief Counsel are in Washington, D.C. The Division Engineers, however, who are generals, have almost complete authority to do as they wish within their divisions. Each division is divided into districts. Within these districts, it is the District Engineer, usually a colonel, who is the contracting officer on most contracts.

110. Circular on ADR, *supra* note 108, reprinted in ADR SOURCEBOOK, *supra* note 70, at 704.

111. *Id.*, reprinted in ADR SOURCEBOOK, *supra* note 70, at 705.

112. *Id.*

113. This was the W.G. Construction Corp. case, a dispute in which the Corps settled a \$765,000 claim for \$288,000 in February 1987. In this case, however, no neutral was employed. Alternative Dispute Resolution Update, *supra* note 102, reprinted in ADR SOURCEBOOK, *supra* note 70, at 588.

114. *Id.* For a detailed discussion of review boards, see *infra* text pp. 234-35.

recent minitrial, which involved a \$1,768,000 claim by Granite Construction Company, actually was a combination of a minitrial and nonbinding technical arbitration.¹¹⁵ The government's and contractor's cases were presented by technical experts, rather than by lawyers, to a neutral technical expert chosen by the two parties.¹¹⁶ This neutral expert then prepared a nonbinding written recommendation which he presented orally to the principals three weeks later.¹¹⁷ After reading the neutral's report and engaging in a 4 hour negotiating session, the principals agreed to settle for \$725,630, the amount recommended by the neutral.¹¹⁸

The Corps has engaged in two other minitrials. In one minitrial, the Middle East/Africa Project Office settled a \$105 million claim for \$7 million.¹¹⁹ In the other minitrial, the Ohio River Division resolved a complicated \$515,123 claim for \$155,000 after a two-and-a-half day minitrial.¹²⁰

Almost all those who participated in the Corps of Engineers experiment expressed pleasure with its successes to date, and the Corps is looking actively for new cases for using minitrials. For example, the Ohio River Division has a new policy which requires that all decisions by the contracting officer within its jurisdiction be considered for ADR, including minitrials.¹²¹

c. *Department of the Navy.* Partly because of the successes of NASA's and the Corps' minitrials and partly because of its concern with the enormous backlog of cases at the ASBCA, the Navy held two experimental minitrials during the summer of 1986. The first experimental minitrial involved two disputes with McDonnell-Douglas Corporation concerning a combination of audit and legal issues.¹²² Both disputes were settled through a confidential minitrial

115. Alternative Dispute Resolution Update, *supra* note 102, reprinted in ADR SOURCEBOOK, *supra* note 70, at 588.

116. *Id.*

117. Memorandum from Stephen Lingenfelter, South Atlantic Division Counsel, to Lester Edelman, Chief Counsel, Corps of Engineers 104 (May 8, 1987) (discussing alternate dispute resolution in Granite Construction Company, Eng. BCA No. 4813) (copy on file with *Maryland Law Review*).

118. *Id.*

119. See Alternative Dispute Resolution Update, *supra* note 102, reprinted in ADR SOURCEBOOK, *supra* note 70, at 587.

120. See *id.*, reprinted in ADR SOURCEBOOK, *supra* note 70, at 588.

121. *Corps of Engineers' Minitrial Considered Success: Program to be Expanded*, 43 Fed. Cont. Rep. (BNA) 259 (Feb. 11, 1985).

122. Interview with Anonymous (July 24, 1987) (copy on file with *Maryland Law Review*).

process.¹²³ The second minitrial involved an overhead cost allocation suit. Although it did not settle, it significantly narrowed the issues.¹²⁴

As a result of the relative success of its first two minitrials, the Navy circulated a one year test policy in December 1986.¹²⁵ This stated that it was the Navy's policy to utilize ADR, including minitrials and summary binding and nonbinding ASBCA procedures, in every appropriate case.¹²⁶ There are two main differences between the Corps' and the Navy's minitrial policies. First, the Navy's General Counsel must approve all uses of ADR before they are conducted.¹²⁷ Second, the Navy strongly prefers that neutrals be current ASBCA judges.¹²⁸ This test policy was followed in July 1987 by a Navy directive that required contracting officers to offer contractors, when appropriate, a summary binding ASBCA procedure in cases involving \$25,000 or less. In disputes greater than \$25,000, the contracting officer was required to review each case for minitrial suitability.¹²⁹ Detailed guidelines on minitrials are forthcoming from the Navy, but the Navy's general policy on minitrial procedures requires that "[p]rior to the issuance of a Contracting Officer's Final Decision, the Head of the Contracting Activity . . . shall ensure that all appropriate steps have been taken to resolve the claim, including the use of ADR techniques."¹³⁰

d. *Department of Energy.* At about the same time that the Corps and the Navy were implementing ADR, the Department of Energy held its first minitrial.¹³¹ This minitrial involved a case in which a six-week hearing just had been completed. Boecon, a subsidiary of Boeing which was the subcontractor in this case, filed a claim against the Department of Energy for damages because of changes and de-

123. *Id.*

124. Interview with John Turnquist, Chief Litigation Counsel for the Navy (June 19, 1987) (copy on file with *Maryland Law Review*).

125. Memorandum from John Lehman, Secretary of the Navy, to General Counsel of the Navy (Dec. 23, 1986) (discussing the Navy's ADR Program), reprinted in ADR SOURCEBOOK, *supra* note 70, at 847.

126. *Procedure to be Used in Navy's Test Program Using Alternative Disputes Resolution*, 47 Fed. Cont. Rep. (BNA) 367, 368 (Mar. 2, 1987) [hereinafter *Navy ADR Program*], reprinted in ADR SOURCEBOOK, *supra* note 70, at 848.

127. *Id.*

128. For a detailed discussion of minitrial neutrals, see *infra* pp. 215-27.

129. Memorandum from Everett Pyatt, Assistant Secretary of the Navy (July 13, 1987) (copy on file with *Maryland Law Review*).

130. Navy Memorandum, Implementation of Alternative Disputes Resolution Program (Dec. 23, 1986) (copy on file with *Maryland Law Review*).

131. See Practice and Perspective, *Complex Construction Dispute Settled By First Energy Board Mini-Trial*, 1 ADR REP. 45 (May 14, 1987).

lay by the government in the construction of a nuclear waste processing plant substructure.¹³² After a year of discovery, pronounced hostility between the attorneys, and numerous unsuccessful attempts by the Department of Energy BCA to convince them to settle, the case finally went to trial.¹³³

A hearing was held before the BCA, and the Administrative Judge began to write his opinion. It was at this point that the parties, with much judicial prodding, agreed to a minitrial. The parties settled for over five million dollars, an amount very close to the original claim.¹³⁴ The settlement was approved formally by the Department of Energy BCA three months after the minitrial.¹³⁵ The Department of Energy has not conducted any more minitrials, and does not have a formal policy on ADR.

e. *Other Agencies.* Increasingly, other offices have become interested in ADR. For example, the Commercial Litigation Branch of the Department of Justice circulated a minitrial policy in June 1986, but has not yet conducted any minitrials.¹³⁶ The EPA issued guidance on the use of ADR (including minitrials) in enforcement cases.¹³⁷ In addition, the Claims Court implemented voluntary ADR procedures suggesting or favoring the use of settlement judges and minitrials.¹³⁸

3. *Minitrial Results.*—Of the eleven cases that have been “minitried” by the government, all but one settled.¹³⁹ Generally, the settlements have been somewhere between the two parties’ positions. For example, in the Tenn-Tom case, “[t]he settlement represented a substantial compromise by both sides from their initial positions in the litigation.”¹⁴⁰ It is impossible to predict how close the settle-

132. *Id.*

133. *Id.*

134. *Id.* at 46.

135. *Id.*

136. Memorandum from United States Department of Justice, Civil Division, Commercial Litigation Branch, on Alternative Dispute Resolution—Mini-Trials (June 19, 1986), *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 827.

137. United States Environmental Protection Agency, Guidance in the Use of Alternative Dispute Resolution in EPA Enforcement Cases (1987), *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 737.

138. For texts of these and other relevant agency policy statements, see ADR SOURCEBOOK, *supra* note 70, at 703-860.

139. The one unsettled case was a Navy minitrial conducted in the summer of 1986. According to one official, however, the minitrial did serve to significantly focus the issues. *See* interview with John Turnquist, *supra* note 124.

140. Ruttinger, *Army Corps of Engineers Settles \$45 Million Claim at Mini-Trial*, ALTERNATIVES TO HIGH COST LITIGATION 1, 3 (Aug. 1985); *see also* R. Nash, *supra* note 45 (the

ments reached in each case have been to what a board would have decided. In the Boecon case, however, the settlement figure was very close to what the judge would have awarded.¹⁴¹ Given the high settlement rate and acceptability of results (with the exception of the controversy over the Tenn-Tom case), it is surprising that so few minitrials have been undertaken.

4. *Benefits and Burdens.*—For most parties who choose to participate in a minitrial, the key consideration is the desire to save time and money. Naturally, the amounts saved will depend on the stage in the litigation at which the parties implement the minitrial process. From beginning to end, minitrials generally take between one and three months for preparation, hearing, and negotiations, as compared to a BCA process that can take from two to four years.

Perhaps the most important reason for preferring a minitrial to litigation is that the expedited minitrial procedure ties up key personnel for a much shorter period of time.¹⁴² This especially is true for smaller contractors and agencies who have only a few top managers. When these managers are occupied with litigation for a year or more, a company inevitably spends less energy on servicing current contracts or developing new business, resulting in a decline in productivity and customer satisfaction. The opportunity cost of litigation often is less immediately apparent to government officers. The administrative and legal manpower costs in both the private and the public sectors, however, should be a significant incentive to shorten the time spent on resolving contract disputes. Also, minitrials likely will produce better decisions than formal processes because the decision-makers are the experts and managers in the field. Finally, minitrials are particularly advantageous when the parties expect to have a continuing business relationship. The minitrial allows them to resolve disputes quickly and in an informal manner which avoids much of the adversarial posturing inherent in litigation.

Evidence that the minitrial process dramatically cuts down the total hours spent on resolving the dispute is more commonsensical and anecdotal than scientific. The parties' attorneys must master

minitrial arrived at "a settlement which pleased neither party but which represented a fair middle ground").

141. Interview with Judge Carlos Garza (June 24, 1987) (copy on file with *Maryland Law Review*). Judge Garza already had held a six-week hearing in the case and was almost halfway through writing his opinion when the minitrial was held, and was thus in a good position to judge the fairness of the settlement.

142. See, e.g., *Applying ADR*, *supra* note 5, at 563 (remarks of Jack K. Lemley).

the details of the dispute in a short time to be able to present cogent, complete arguments at a minitrial. While minitrials are believed to reduce discovery and trial time, "[t]he preparation by the trial attorney must be even more intense and consuming than for a board meeting. The trial attorney must know his case *totally*."¹⁴³ For instance, one Corps attorney stated that in preparation for the minitrial she did approximately two-thirds the amount of work she would have for a regular hearing.¹⁴⁴ She, however, also said that the process was well worth the time because the dispute was resolved quickly and with less disruption of work.¹⁴⁵ Clearly, an intensive preparatory effort is required to present and negotiate effectively. Equally apparent, however, is that these efforts almost always have succeeded in resolving the case.

5. *Minitrial Decision-makers.—Principals.*—The principals are crucial participants in any minitrial or other ADR process. The principals are representatives of each party to the dispute who hear competing presentations and then seek to negotiate a settlement. The principals most often have been relatively high ranking government officials and business executives. Although opinion and practice have varied as to the appropriate rank, experience, and preparation of the principals, a number of helpful observations can be made.

How Many Principals?—The number of principals representing each side has varied and may even be as many as three individuals.¹⁴⁶ A clear trend, however, exists toward using a "panel" of only one principal from each side (possibly assisted by a neutral advisor). Using a small panel has the advantage of being less burdensome, as well as simplifying the "hearing" and negotiation segments of the minitrial. Generally one representative should suffice.¹⁴⁷ There, however, inevitably will be cases in which the issues are so sprawling

143. Jockisch, "Mini Trial" (1st Impression) (Aug. 13, 1985) (emphasis in original) (copy on file with *Maryland Law Review*).

144. Interview with Reba Page, Ohio River Division trial attorney in the Corps' Walter T. Dickerson Minitrial (July 31, 1987) (copy on file with *Maryland Law Review*).

145. *Id.*

146. ABA SUBCOMMITTEE REPORT, *supra* note 79, at 24 (*i.e.*, one business representative and two attorneys), *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 253.

147. The exception proving the rule is the one government minitrial to date in which a larger panel was employed, the NASA-TRW dispute, a very complicated multiparty case in which, coincidentally, no neutral advisor was used since none could be found who was adequately informed. Johnson, Masri & Oliver, *supra* note 98, at 13, *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 573.

and complex that a lone representative could not properly prepare and negotiate.

Who Should Serve?—A party must balance several competing factors when selecting its principal. Principals should have enough responsibility in their organizations to negotiate, and successfully defend, a binding settlement. More specifically, they must have inherent or delegated authority to bind the organizations they represent in the dispute at hand. Principals generally should come from a higher level in the organization than that in which the controversy arose.¹⁴⁸ Principals should have little prior involvement with the case. This will enable the principal to look objectively at the issues.¹⁴⁹ On the other hand, they will need enough technical expertise to grasp the main issues quickly.

Another competing consideration, especially for government agencies, is that the principal cannot hail routinely from such a high level that his or her involvement will detract from the agency's operations. If minitrials become more important, it will be especially important to recognize that top management's time is at a premium.¹⁵⁰ A few ways in which agencies can meet this concern are by tailoring the rank of the manager-principal to suit the magnitude of the case, by encouraging ADR use earlier in the case (*e.g.*, the contracting officer level), or by occasionally bringing in auditors or others as principals.

Contractors often have used vice presidents with responsibility for government contract activities or other senior executives as principals. In the Corps of Engineers, the principals have tended to be division engineers.¹⁵¹ These division engineers are generals who oversee the work of several districts where contracts are adminis-

148. Edelman & Carr, *supra* note 78, at 9, reprinted in ADR SOURCEBOOK, *supra* note 70, at 231.

149. When an agency or contractor is not large, or on major agency projects, there may be some difficulty finding an "unbiased" principal. This has not precluded successful resort to minitrial, which in any event likely will be a principal's first chance to hear all the weaknesses of his side's case and thus should be of considerable value. See letter from Stephen Lingenfelter, Division Counsel, to Lester Edelman, Chief Counsel, Corps of Engineers (Dec. 13, 1984) (copy on file with *Maryland Law Review*).

150. The government principal should be as high ranking as possible. The reason for this perhaps stems from a desire to increase finality by reducing second-guessing within the agency; other possible explanations are that a high level officer will be less influenced by operational level biases, less well-informed on technical details, more comfortable dealing with large sums, or simply inclined to split the difference and get back to other duties.

151. Interview with Frank Carr, Corps of Engineers (June 18, 1987) (copy on file with *Maryland Law Review*).

tered day-to-day. In smaller minitrials, contracting officers occasionally have acted as principals.¹⁵²

Agencies may wish to designate several respected officials (*e.g.*, generals or admirals in the armed forces) as a pool of potential principals for major minitrials. Further, agencies should take the necessary steps to make participation as a principal an attractive career step. Agencies should encourage (or even provide) training in negotiation, mediation, and ADR skills among groups of potential principals.

Virtually all knowledgeable observers disfavor using attorneys as principals. Rather, high or mid-level bureaucrats, business representatives, or technical experts are preferable. "The involvement of top management in the mini-trial is essential to the success of the process. Having top management decide the dispute, rather than attorneys and judges, enables the parties to utilize management skills and policies to resolve a dispute that is heavily fact-oriented."¹⁵³ Lawyers are trained, and often tend to act, more as advocates than as negotiators. Consequently, they may be less likely to reach decisions based on sound business reasons than on litigation tactics or formal legal or other principles which are less relevant to the case at hand. Opponents often are reluctant to risk a minitrial under such circumstances.

Preparation.—While a few observers believe that unfamiliarity with the dispute is the best approach, most principals to date have been well served by being thoroughly informed in advance of the relevant facts and the parties' positions. This will permit the trial counsel to concentrate on educating the *other* principal and the neutral advisor as to the strengths of the case and the weaknesses of the opponent's. The minitrial preparations of the principal should include both liability and damages issues, because any settlement necessarily will address these issues. Given the brief time frame, the principal will not have the time to prepare a damages case once the hearing has begun.

A good example of thorough preparation is that done by the government principal William Voigt in the Department of Energy-Boecon proceeding. Mr. Voigt, a nuclear physicist serving as the Director of the Department's Office of Remedial Action and Waste Technology, had only limited previous experience in contract dis-

152. This was the case, for example, in the W.G. Construction, Inc. minitrial. *Id.*

153. Edelman & Carr, *supra* note 78, at 9, reprinted in ADR SOURCEBOOK, *supra* note 70, at 233.

putes.¹⁵⁴ He estimated that he spent seventy-two hours reviewing briefs and documents, talking to the Department's project manager, and being briefed by the agency's trial attorneys and General Counsel on the law.¹⁵⁵ His burden, however, was especially great because the case already had gone through a year of discovery and a six-week hearing. Most principals to date have spent considerably less preparation time, and some view this degree of preparation by a high-level manager as excessive. Even Mr. Voigt believed that he could have negotiated comfortably with less information.¹⁵⁶ Still, this degree of preparation has helped produce prompt settlements of bitterly contested, highly complex disputes without subsequent recriminations.

Principals' Roles.—During the minitrial process, the principals' roles typically include presiding over the "hearing," enforcing (and decide whether to vary) the ground rules, and negotiating together immediately after the hearing. During the initial stage, the principals are free to pose questions, either while both sides are presenting their cases or in designated question-and-answer sessions. Principals also determine the role to be played by the neutral advisor. The principals should not only approach the process with an open minded willingness to assess both sides, but they also must conduct themselves so as to avoid appearing biased as to the merits. If not, effective negotiation is inhibited. One way to help ensure that the principals do not appear overly biased is to encourage the neutral advisor to ask many of the tough questions at the hearing, even at the risk of having the neutral appear biased.

Once the principals have assessed the strengths and weaknesses of both sides' positions, their negotiations should take place promptly. Any settlement reached by the principals should be final and binding. Principals should not feel inhibited from seeking expert advice as needed during their talks or involving other representatives in the negotiations. At the same time, the responsible principals should have, and feel comfortable exercising, authority to resolve all issues before them without seeking third-party approval following the close of negotiations.¹⁵⁷

154. Interview with William R. Voigt, Department of Energy (June 26, 1987) (copy on file with *Maryland Law Review*).

155. *Id.*

156. *Id.*

157. One exception here may be occasional consultation with in-house counsel in preparation of a settlement or legal memorandum supporting the result. *E.g.*, *Navy ADR Program*, *supra* note 126, at 368 (the Navy principal must have the right to consult with nonlitigation in-house counsel prior to a final agreement or resolution of a dispute).

Successful service as a principal generally requires more than sound preparation, questioning, and negotiating. Some degree of courage and bureaucratic skill also will be needed. Principals sometimes will need to find merit in an opponent's contentions long after subordinates, auditors, or counsel have taken fixed (and possibly narrow or contentious) positions to the contrary. Some potential principals inevitably will lack the fortitude or skill to resolve difficulties that arise over a contract. Just as many cases will not be appropriate for ADR, there inevitably will be some mistakes made in those which are minitried.

Contracting officers, project officers, and their superiors (at headquarters, regional, or division level) must recognize two fundamental notions: *first*, there are worse things than making a mistake and, *second*, safe procedures and exhaustive documentation will not necessarily produce better decisions, but often will produce more procedures and, ultimately, stultification. It remains to be seen whether bureaucratic behavior, agency evaluations, and congressional oversight of minitrial uses can reflect sensitivity to these factors. If they do, there is a possibility of creating the leadership necessary for developing (1) an atmosphere that will make line officers comfortable with exercising discretion, (2) minitrial or other ADR procedures designed to yield defensible compromises efficiently, and (3) officers who have the skills and training to use them energetically.

These developments, however, are a long way off. So far, no principal has served twice in minitrials. In some agencies, congressional objections or other controversies over particular settlements have inhibited the use of ADR. For instance, notwithstanding the exceptional leadership displayed in the Corps' ADR effort, the relatively small number of minitrials so far may stem from a reluctance of some division officers to risk recriminations at the district level or investigations by the inspector general. Without bureaucrats and officers who are willing and able to exercise the negotiation and management skills necessary to be a principal, the area of government contracts never will realize the value inherent in minitrials and other kinds of ADR.

6. *Other Participants.*—Principals generally have access to advisors, including (in appropriate cases) legal counsel, technical experts, and auditors. Frequently, these persons take part as witnesses or observers in minitrials. In other cases, the principal only consults with them in preparation and acts alone at the minitrial itself. These persons certainly should be available to those principals who desire

such assistance during the hearing and negotiations.¹⁵⁸ This serves to produce a more well-informed, defensible resolution. It also helps to enhance accountability and to build intra-organizational support for the settlement. Achieving these goals is important because by the time a dispute reaches the BCA stage, major segments of the agency will have fought a contractor's claims and likely will be displeased at the prospect of a settlement that is negotiated in a day or so.

At times during the negotiation phase, the principals will have the benefit of caucuses with others from their organizations to discuss the progress of the negotiations and the staffs concerns. When the government principals think it is important for the contractor to provide a more detailed explanation of claimed costs, they also will bring auditors or other staff members into the negotiations.

On occasion, access to the hearing will be tightly restricted, and witnesses sequestered. For example, in the Navy-McDonnell Douglas minitrial, in addition to sequestering the witnesses, auditors were not allowed to be present at the minitrial, even though the case raised cost allocation issues.¹⁵⁹ Unless secrecy is especially important, it ordinarily will be unwise to sequester most minitrial witnesses. This is particularly true of experts, since a looser format may encourage dialogues or exchanges that can help focus issues and even promote agreement.

Legal Advisors. In many instances, the principal may desire to have a legal advisor. An attorney interviewed for this study, however, suggested that if the principal is to have a legal advisor during the course of the proceeding, this person ordinarily should not be the trial counsel who prepares and presents the case at the minitrial.¹⁶⁰ Such a dual role poses the danger that the trial counsel might be too adversarial to provide dispassionate advice during the settlement talks. The counter argument, of course, is that qualified lawyers would know best how to serve their clients, whether in an adversarial or an advisory context, or both.

158. The Corps apparently makes a practice of including auditors at minitrials. See interview with Frank Carr, *supra* note 151.

159. Interview with Ralph Nash, Jr., Professor, George Washington University (July 28, 1987) (copy on file with *Maryland Law Review*). This decision and the settlement it produced have been criticized by some agency officials as intended simply to "allow the parties to continue their business relationship" without confronting all issues. These critics, however, have not questioned the substantive settlement, only the closed process by which it was reached. Interview with Anonymous, *supra* note 122.

160. Letter from Wesley C. Jockisch to Lester Edelman, Chief Counsel, Corps of Engineers (Aug. 13, 1985) (copy on file with *Maryland Law Review*).

Auditors. Volumes could be written on the benefits and drawbacks of the growing reliance upon auditors and inspectors.¹⁶¹ These personnel presumably will have a role in many cases which feature major issues of accounting principles or their application. Auditors are valuable resources and should not be ignored. They can address cost issues (incurred and allowable) and help principals decide these issues so that the principal understands what a good settlement figure is. Auditors, who participate in minitrials as part of a management problem solving team, can be quite effective in furthering defensible settlements in the government interest. The auditor must realize that accounting, like management, often is as much an art as a science. As with lawyers, principals, and oversight personnel, what is to be avoided is inflexible auditor participation. Also to be avoided is an auditor who refuses to balance competing views or fails to give heed to the fact that management realities sometimes must influence decisions as much as the ability to place everything into "neat" categories.

7. *Neutral Advisors.—Is a Neutral Necessary?* Unlike the principals, the "neutral advisor" who helps the parties assess the merits of a case is not always necessary. While a majority of attorneys surveyed in one study thought that the advisor was helpful in resolving their disputes,¹⁶² several government minitrials have yielded settlements without any third-party intervention.¹⁶³ In fact, the Department of the Navy's policy recommends the use of an advisor in smaller cases only in exceptional cases.¹⁶⁴ It is difficult to categorize cases in which a neutral is less likely to be helpful. Some examples include cases in which the principals already have a good working relationship, when issues are simple or amounts small, or, conversely, when complex technical issues predominate to such an extent that it would be futile to waste time trying to educate a neutral.

161. In the Department of Defense, contracting officers who depart substantially from auditors' recommendations must justify their actions in writing. Bednar & Jones, *supra* note 44, at 49. The Department of Defense Office of the Inspector General now supervises over 20,000 persons, including Defense Contract Audit Agency auditors and more criminal investigators than the entire FBI.

162. ABA SUBCOMMITTEE REPORT, *supra* note 79, at 20, reprinted in ADR SOURCEBOOK, *supra* note 70, at 274.

163. In 1982, NASA resolved a \$100,000 dispute with TRW without the use of a neutral. *Appeals Board Judges' Conference Explores ADR Applicability*, 1 Alt. Dis. Res. Rep. (BNA) 32, 33 (May 14, 1987). In addition, the Corps settled a \$764,783 claim for \$288,000 without a neutral. *Id.* at 33-34.

164. *Navy ADR Program*, *supra* note 126, reprinted in ADR SOURCEBOOK, *supra* note 70, at 849.

Neutrals may be needed when the minitrial occurs soon after the dispute arises, *i.e.*, at the contracting officer level. At this point, positions may be less rigid, formal procedures not yet invoked, and fewer parts of the agency implicated. In those cases, the contracting officer might well serve as a sort of presider-principal.

Roles of the Neutral. In the cases in which neutrals have been used, their role has varied greatly. The role of the neutral naturally will depend on the dispute and the parties' wishes, the neutral's background, skills, and predilections, and developments during the minitrial process. Indeed, one of the strengths of the minitrial is the flexibility available to the parties to shape the neutral's role to the case at hand. In most cases, this role has been very different from, though not necessarily incompatible with, that of a judge.¹⁶⁵ For example, the neutral makes no binding decisions on the merits, and usually does not become involved in the management of the case or attempt to control or regulate the manner or substance of the presentations. Rather, he or she serves as a facilitator and an advisor who poses questions. In addition, when asked by the principal representatives, the neutral may provide insight and observations on various points and issues.¹⁶⁶

The neutral's role should be defined (at least tentatively) prior to the hearing. The principals should give input as to what role the neutral will fill. Any shift during the proceeding should be only with the concurrence of the principals.

In the Corps' Tennessee-Tombigbee case, as in some others, the role of the neutral advisor turned out to be larger than anticipated.¹⁶⁷ The principals (both high-ranking managers) and the neutral met for dinner the night before the minitrial. They decided that, notwithstanding a fairly restrictive minitrial agreement, the entire proceeding should be approached with a degree of flexibility.¹⁶⁸ During the hearing, the neutral and the principals asked questions to assure that the facts were ascertained. At one point, the neutral advisor suggested that key expert witnesses of each side be called

165. *Appeals Board Judges' Conference Explores ADR Applicability*, *supra* note 163, at 33 (remarks of Ralph Nash, Jr.).

166. See letter from Stephen Lingenfelter to Lester Edelman, *supra* note 149.

167. Mini-Trial Agreement on Contract No. DACW62-79-C-0102, Apr. 15, 1985, United States Corps of Engineers-Tenn-Tom Constructors (construction contract for the Divide Cut of the Tennessee-Tombigbee Waterway) (copy on file with *Maryland Law Review*). The minitrial agreement provided that the advisor "will be responsible for enforcing the time limitations set forth in paragraph 13 hereof, but otherwise will not be actively involved in the conduct of the mini-trial proceedings." *Id.* at 4.

168. R. Nash, *supra* note 45.

and questioned simultaneously. The neutral then guided the experts "through a conversation where they were able to directly confront each other in discussing the most significant areas of factual disagreement."¹⁶⁹

The neutral also helped the parties prepare for, and identify relevant issues in a supplemental hearing on quantum (damages). During the negotiation the neutral advisor worked actively to aid settlement. He advised each side on the strengths and weaknesses of its case, the relevant legal principals, and how the law applied to the facts established. The neutral also served "as a type of mediator suggesting middle grounds that might lead to settlement and proposing various methods of computing the amount of the price adjustment to which the contractor might be entitled."¹⁷⁰

This model, obviously a relatively activist one, includes inquisitorial, advice-giving, and mediating components. Attorneys in many minitrials have expressed the view that the advisor is most useful when he is similarly actively involved.¹⁷¹ Without controlling the proceedings or making judicial-style rulings, the advisor can be helpful questioning witnesses in a probing yet nonadversarial fashion, responding freely to principals' requests for advice,¹⁷² and gently pointing out the proper weight to be given certain testimony.¹⁷³ The advisor may even provide a written, nonbinding opinion to aid the principals. At the other extreme, the neutral may do little more in furthering a settlement than respond to technical or legal ques-

169. *Id.*

170. *Id.* In the Corps and Industrial Contractors, Inc. minitrial, the neutral, when requested, told the principals that the contractor had a slightly better case than the government, but that its costs were inflated and there was substantial room for negotiation. Letter from Stephen Lingenfelter to Lester Edelman, *supra* note 149, at 4. In the Department of Energy and Boecon Company minitrial, the neutral similarly advised the parties, though the neutral never advised a party to accept a particular offer. *Complex Construction Dispute Settled By First Energy Board Mini-Trial*, 1 Alt. Dis. Res. Rep. (BNA) 45, 46 (May 14, 1987).

171. See ABA SUBCOMMITTEE REPORT, *supra* note 79, at 20, reprinted in ADR SOURCEBOOK, *supra* note 70, at 274.

172. One neutral recognized a need for the advisor to "reassure [the principals] as to the impact of federal contract law in the case." *Appeals Board Judges' Conference Explores ADR Applicability*, *supra* note 163, at 33.

173. This might happen if evidence clearly is hearsay or another reason for concern exists. In the Corps of Engineers and Industrial Contractors, Inc. minitrial, for example, the neutral pointed out that, while the views of a consulting C.P.A. who testified on planned and total costs would be of interest, he also would want to hear from an engineer who could address the reasonableness of the planned cost and reasons for increases. According to the neutral, an auditor generally provides an analysis of information given to him without questioning why or how costs were incurred. Letter from Stephen Lingenfelter to Lester Edelman, *supra* note 149, at 2-3.

tions from the principals. If the principals are concerned that members of their staffs need to be persuaded, the neutral can help by suggesting that they be brought into the negotiations. Another technique to pacify skeptical staff members is briefing or working with the principals and attorneys to prepare a settlement memorandum or other justification for the compromise reached. Unless principals specifically direct otherwise, a neutral who feels comfortable acting in a mediative role should not hesitate to do so.

Requisite Skills. Many who have participated in minitrials maintain that neutral advisors need no legal training, and that any person acceptable to the parties can be used, since many cases turn on engineering, accounting, or other technical or nonlegal questions.¹⁷⁴ Some suggested that mediation training is useful, allowing the neutral to respond perceptively to the principals' wishes and also help further negotiations if asked.¹⁷⁵ However, no neutral in a government minitrial has been a professional mediator.¹⁷⁶ Others maintain legal expertise to be a *sine qua non*.¹⁷⁷ They note that the principals and their staffs likely will have the background to weigh technical issues, but frequently would benefit from independent legal advice on what often are arcane matters. This will let them assess risks better, reach a decision, and "sell" or defend a settlement within their organizations.¹⁷⁸ Both the Navy and the Corps require the neutral to have government contracting and litigation experience.¹⁷⁹

Sources. Theoretically, major sources of ADR neutrals include (1) former judges, (2) BCA members and other active judges, (3) academics, (4) current government employees, (5) retired government employees, (6) private practitioners, and (7) mediators or their ADR experts. Virtually all neutrals in the relatively few cases to date have been ex-judges or law professors with an expertise in government contracting. Each of these potential pools has its advantages

174. See ABA SUBCOMMITTEE REPORT, *supra* note 79, at 21, reprinted in ADR SOURCEBOOK, *supra* note 70, at 275.

175. See interview with Judge Richard C. Solibakke, Corps of Engineers BCA (Feb. 12, 1987) (copy on file with *Maryland Law Review*).

176. *Appeals Board Judges' Conference Explores ADR Applicability*, *supra* note 163, at 33.

177. See Edelman & Carr, *supra* note 78, at 11, reprinted in ADR SOURCEBOOK, *supra* note 70, at 235.

178. Remarks of Professor Ralph C. Nash, Jr., BCA Judges Association Seminar (Apr. 11, 1987) (copy on file with *Maryland Law Review*).

179. Army Corps of Engineers Minitrial Policy (Sept. 23, 1985) (issued in Engineer Circular 27-1-3), reprinted in ADR SOURCEBOOK, *supra* note 70, at 703; *Navy ADR Program*, *supra* note 126, at 368, reprinted in ADR SOURCEBOOK, *supra* note 70, at 849.

and disadvantages, many obvious and others fairly subtle.¹⁸⁰

*Private Practitioners and Retired Judges.*¹⁸¹ There are a number of potential problems in finding, hiring, and contracting with private neutrals. The lengthy nature of the standard procurement process often is inconsistent with the goals of ADR and negotiated rulemaking, in which speed and efficiency often are critical. The competition required in all but small procurements may be inconsistent with an agency's particular needs. Emphasizing price as a consideration in evaluating proposals may not be the most effective means of selecting the best neutral for the job. While most agency payments to neutrals (save in a few large cases) will fall below the thresholds for full competition and notification, this fact does not render negligible the importance of competition and an open process.

Other problems of dealing with private neutrals, and some publicly employed ones, relate to qualifications and neutrality. Hard-and-fast rules are not easy to come by, but the Administrative Conference has suggested a few guidelines:

While skill or experience in the process of resolving disputes, such as that possessed by mediators and arbitrators, is usually an important criterion in the selection of neutrals, and knowledge of the applicable statutory and regulatory schemes may at times be important, other specific qualifications would be required only when necessary for resolution of the dispute. For example:

(a) Agencies should not necessarily disqualify persons who have mediation, arbitration or judicial experience but no specific experience in the particular ADR process being pursued.

(b) While agencies should be careful not to select neutrals who have a personal or financial interest in the outcome, insisting upon "absolute neutrality"—*e.g.*, no prior affiliation with either the agency or the private industry involved—may unduly restrict the pool of available neutrals,

180. See generally *Appeals Board Judges' Conference Explores ADR Applicability*, *supra* note 163, at 32-33.

181. George Ruttinger, in his 1986 study for the Administrative Conference, thoughtfully explored several major issues involved in using some of these groups, including neutrality standards, relevant expertise, and finding and hiring private neutrals. Ruttinger, *Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 891 (1986), reprinted in ADR SOURCEBOOK, *supra* note 70, at 885. Ruttinger's conclusions are embodied in Administrative Conference Recommendation 86-8. 1 C.F.R. § 305.86-8 (1989).

particularly where the neutral neither renders a decision nor gives formal advice as to the outcome.

(c) Agencies should insist upon technical expertise in the substantive issues underlying the dispute or negotiated rulemaking only when the technical issues are so complex that the neutral could not effectively understand and communicate the parties' positions without it.¹⁸²

A few agencies have taken a position against using as a neutral any private lawyer who has represented contractors against the government or who has any past or present affiliation with any party to the dispute. These policies seem somewhat too restrictive. They, however, may be justified as necessary to insulate the first few tentative minitrials from one possible source of criticism. Realistically, though, the persons most knowledgeable about contracting disputes almost certainly will have been affiliated with the government, private contractors or both. In the long run, unless retired and sitting judges are used exclusively, restrictive agency policies probably will mellow. So long as private neutrals have no personal or financial stake, they should be eligible to serve.

Academics. A surprisingly high number of advisors have been law professors who are experts in the field of government contracts. Under some agency minitrial policies, certain law professors are regarded as preferred minitrial neutrals¹⁸³ because of their expertise and perceived neutrality. In addition, unlike BCA judges, they can be employed without concern that other cases will suffer neglect. On the other hand, unless these neutrals provide their services pro bono, the parties will have to pay these advisors under an acquisition contract. Another concern is that academics may have strong views on some legal, accounting, or technical questions and thus unduly influence the outcome. In any case, professors with this background are few in number.¹⁸⁴ Barring a rapid rise in academic interest in the area, this resource pool will remain shallow quantitatively if not qualitatively.

BCA Members and Other Active Judges. Most observers in the contract field view these officers as potentially excellent neutrals. For example, under the recent Navy and Claims Court ADR policies, active BCA members and judges comprise the preferred sources for

182. 1 C.F.R. 305.86-8 (1989).

183. See Army Corps of Engineers Minitrial Policy, *supra* note 179, at 3, reprinted in ADR SOURCEBOOK, *supra* note 70, at 705.

184. As of 1987, all such government minitrial neutrals taught at the George Washington University School of Law, which has a unique government contracts program.

minitrial neutrals.¹⁸⁵ Some obvious advantages associated with using these individuals as neutrals include their expertise in government contracting matters,¹⁸⁶ the authoritative nature of their advice, the fact that they are already on the government payroll, and their relative neutrality.¹⁸⁷ The BCAs are currently the tribunals of last resort for the great bulk of government contract disputes that reach litigation. They have gained the credibility and the authority that may be employed readily to help parties resolve many of their disputes earlier in the process and with less formality than a full hearing.

Other advantages also may accrue. Because administrative judges are familiar with issues or cases (or classes of cases) commonly before their boards, they presumably should take less time than outsiders to get acquainted with the facts and issues of a minitrial. A presiding BCA judge also may be more willing to enter a settlement negotiated with the involvement of another judge as a board order than a settlement negotiated by a private neutral. This may influence the government's willingness to settle, since in some cases a formal order, unlike an agreement between the parties, may be paid from the general judgment fund rather than scarce agency program funds.¹⁸⁸ Similarly, Congress may prove more receptive to appropriating additional funds to cover large settlements which are

185. United States Claims Court General Order No. 13 (Apr. 15, 1987), *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 731; *Navy ADR Program*, *supra* note 126, at 368, *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 849.

186. BCA judges are required to have five years experience in public contract law. 41 U.S.C. § 607(b)(1) (1982).

187. Administrative Judges at BCAs, according to the Contract Disputes Act of 1978 (CDA), are to be selected in the same manner as Administrative Law Judges (ALJs), *id.* § 607(b)(1), and are insulated by *ex parte* restrictions and other guarantees of independence. Daniel Joseph and Michelle Gilbert's Draft Report to the Administrative Conference of the United States regarding agency use of settlement judges indicates that the settlement judge can command substantial deference and speaks with authority that derives both from his general familiarity with an agency's case load and his position as a judge. Joseph & Gilbert, *Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 281, 297 (1988). "If that official decisionmaking system meets [the parties] halfway with an official, authoritative, but still non-binding and non-prejudging review of the questions of whether settlement is appropriate, they may feel that their perceived need to invoke adjudication has been responded to." *Id.* at 297-98.

188. The CDA technically requires agencies to reimburse the judgment fund either out of current funds or through deficiency appropriations from Congress. 41 U.S.C. § 612(c) (1982). Sometimes, however, agencies cannot reimburse the fund because they do not have enough money themselves and are unable to get additional appropriations, either because the Office of Management and Budget prevents them from asking Congress or Congress refuses the request. While the General Accounting Office (GAO) seeks to ensure subsequent reimbursement, and maintains that it usually does so, con-

approved by a BCA member. Finally, congressional committees or inspector generals may be somewhat less likely to closely scrutinize such agreements.¹⁸⁹

Experts in federal personnel and contracting, including representatives of the General Accounting Office (GAO), agree that there are no legal obstacles to BCA members acting as neutrals in cases pending before their own or other Boards.¹⁹⁰ The only restriction under the CDA is that BCA members shall have no other inconsistent duties.¹⁹¹ As long as the agency knows that its BCA members are serving as neutrals and has determined that there is no conflict with their regular duties, there will be no legal impediments to using BCA judges as neutrals.

On the other hand, the Army Corps of Engineers prefers not to use BCA judges, and has employed private neutrals.¹⁹² Several knowledgeable observers have advanced vigorous arguments against using BCA judges as neutrals. Their concerns are:

- (1) Government personnel's time and services are hardly

tracting officials' perceptions that payments will not affect current appropriations are real and have an effect.

189. An example of the danger settlements can run into is *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539 (Ct. Cl. 1980). The Veterans Administration (VA) reached a \$10.3 million settlement with Blackhawk for a dispute arising out of the construction of additions to a VA hospital. *Id.* at 541. Before the money could be paid, however, a number of senators and congressman questioned the settlement and urged the Administrator of the VA not to pay it. The Administrator nevertheless decided to honor the settlement. *Id.* at 544. As a result, an amendment was added to the Supplemental Appropriations Act of 1974 which required the VA to obtain specific appropriation from Congress to settle any construction contract dispute for over \$1,000,000. *Id.* The conferees also provided that the VA could pay only up to \$6,000,000 of any pending settlement agreement. *Id.* at 544-45. The conference report further stated that

it is the sense of the conferees that all claims against the Veterans Administration should be processed through the agency Board of Contract Appeals unless there is adequate legal analysis, audit information, and claim documentation to show that settlement outside the board of contract appeals is in the best interests of the government.

Id. at 545.

The VA paid \$6 million of the settlement before the Appropriations Act was enacted into law, but thereafter could not legally pay the remaining amount. *Id.* at 545-46. Blackhawk then initiated suit for payment. The court held that the contract was subject to acts of Congress, and that Blackhawk was not entitled to the rest of the settlement, though it could still pursue further relief in an appropriate forum in connection with the contract claims underlying the settlement. *Id.* at 552-54.

190. Interview with Dick Berg, MLS, Marvin Morse, Department of Justice, and Rollee Efros, General Accounting Office (Aug. 6, 1987) (copy on file with *Maryland Law Review*).

191. 41 U.S.C. § 604(a)(1) (1982).

192. Interview with Frank Carr, *supra* note 151; interview with Judge Richard C. Solibakke, *supra* note 175.

“free,” and the effective costs may equal or exceed those of private neutrals.

(2) BCA judges, at least at several boards, have large backlogs and can spend their time better by writing decisions rather than working to resolve cases that may ultimately settle without judicial intervention.¹⁹³

(3) Many BCA judges are experts, not at mediation or minitrial or even settlement promotion, but rather at holding formal hearings and applying contracting or accounting rules to factual situations in written decisions.

(4) Even if the BCA member acting as a neutral advisor is recused after an inconclusive minitrial, the close quarters and small size of most boards can render confidentiality difficult to maintain. A judge may have a difficult time avoiding hearing discussions of a case.

(5) Many boards have only three members, and, since panels are comprised of three judges will have trouble finding a minitrial settlement judge who could then be recused if settlement efforts fail.

These interviewees maintained that active judges are accustomed to presiding over formal proceedings and issuing rulings to control the parties. Other individuals with relations to the parties that are more flexible and less hierarchical may be more likely to tailor their actions to the instant case. In addition, they fear that control of the process, intended to be shaped and guided by the parties, will be lost to the judges.

Some judges obviously are more successful at promoting settlements than others, usually those who are less activist. Similarly, minitrial “styles” will vary. Even so, it is worth considering whether BCA judges, as a class of individuals who preside regularly over a relatively compact group of agency personnel and public contractors lawyers, may be less inclined to intervene actively to offer frank opinions and explore alternatives. They also may be received less comfortably than someone who is unlikely to preside over the parties ever again. One judge stated that, if called on to serve as a neutral in a case already before him, he would be uncomfortable getting involved in quantum discussions, would be less likely to get involved in furthering a rapport with the principals, as have some neutrals,

193. The majority of cases at the ASBCA, for example, have been resolved without hearings in recent years. Final Minutes of Administrative Conference Committee on Administration Meeting (May 2, 1986) (comments of Judge Ruth Burg).

and would be leery of *ex parte* contacts and of talking to the principals without counsel present, as many mediators and other neutrals do regularly.¹⁹⁴ The same judge suggested that he would feel only somewhat less constrained if he were not going to be on the panel ultimately hearing the case, and would feel most free to take an active role if he were serving as a neutral for another agency's board.¹⁹⁵

The weight of the objections recited to using board members as neutrals is certain to vary depending on the judge, the board, the case in question, and available alternative neutrals. Several objections, however, can be overcome and agencies clearly have the authority to use BCA judges as neutral advisors. These expert officials should not be excluded routinely. The dispute resolution experience gained in mediation or minitrials may be carried over to the remainder of a judge's cases.¹⁹⁶ Several board chairmen responded enthusiastically to experimenting with ADR, and, specifically to having interested board members trained to act as minitrial neutrals. Careful thought should be given to how best to employ the board members more actively to resolve cases without hearing.

Selection and Payment. The parties sometimes identify the neutral in the minitrial agreement. More commonly, however, the minitrial agreement includes a provision setting forth the selection procedure. The most common process is submission by the parties of ranked lists of acceptable neutrals.¹⁹⁷ Under the Navy process the

194. Interview with Judge Carroll C. Dicus, Jr., NASA BCA (July 15, 1987) (copy on file with *Maryland Law Review*). These averments are not included to demonstrate that judges should not be used as neutrals. Rather, they suggest that it may be unwise to limit the parties to judges from a particular board or even to BCA judges as a group.

195. *Id.*

196. This has proven true, for instance, at the Merit Systems Protection Board (MSPB), where some presiding officers participating in an expedited appeal experiment upped their overall settlement rate dramatically. Letter from Paul Mahoney, MSPB, to Charles Pou (Mar. 11, 1987) (copy on file with *Maryland Law Review*).

197. *E.g.*, Guidance on the Use of Alternative Dispute Resolution in EPA Enforcement Cases (EPA memorandum) [hereinafter EPA ADR Guidance], reprinted in ADR SOURCEBOOK, *supra* note 70, at 738. These guidelines suggest the following selection method:

After the filing of the joint request for arbitration, the NAA [National Arbitration Association] shall submit simultaneously to all parties to the dispute an identical list of ten [five] names of persons chosen from the National Panel of Environmental Arbitrators. Each party to the dispute shall have seven days from the date of receipt to strike any names objected to, number the remaining names to indicate order of preference, and return the list to the NAA. If a party does not return the list within the time specified, all persons named shall be deemed acceptable. From among the persons who have been approved on all lists, and if possible, in accordance with the designated order of mutual prefer-

parties must agree on a list of mutually acceptable ASBCA judges to be submitted to the Board's Chairman.¹⁹⁸ At the Claims Court, an ADR judge is assigned by the Clerk of the Court on application by the parties with the presiding judge's concurrence.¹⁹⁹

Occasionally an effort is made to ascertain, and maintain, an advisor's neutrality at this stage. For example, either party may be forbidden to approach the advisor unilaterally on any issue concerning the merits of the dispute or the parties may even be required to ascertain and disclose all prior contacts with a person nominated to serve as advisor.²⁰⁰ Such formality often may be unnecessary or counterproductive, but may help guarantee acceptability and fairness.

A few private neutrals have served without charge, while others have contracted to serve for fixed fees with the costs split by the parties.²⁰¹ An alternative used occasionally provides that if the advisor gives an opinion on how the case should be resolved, a party who fails to follow the recommended disposition shall bear the advisor's fees and expenses.²⁰²

Roster of Neutrals. There are a number of challenges which must be met to foster the expansion of ADR and the use of neutrals. Agencies should attempt to develop and refine procurement procedures that will simplify the process of hiring outside neutrals. The government also should strive to expand the base of private or public individuals from which to select the neutrals. Information on neutrals should be pooled into a centralized place from which ros-

ence, the NAA shall invite an Arbitrator to serve. If the parties fail to agree upon any of the persons named, or if acceptable Arbitrators are unable to serve, or if for any other reason the appointment cannot be made from the submitted lists, the NAA shall make the appointment from among other members of the Panel without the submission of any additional lists. Once the NAA makes the appointment, it shall immediately notify the parties of the identity of the Arbitrator and the date of the appointment.

EPA ADR Guidance Attachment C, *supra*, at 3-4, *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 776-77.

198. *Navy ADR Program*, *supra* note 126, at 368, *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 849.

199. United States Claims Court General Order No. 13 (Apr. 15, 1987), *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 732.

200. See Minitrial Agreement between Trunkline LNG Co. and FMC Corp. (Oct. 4, 1985) (copy on file with the *Maryland Law Review*).

201. For a discussion of contracting issues in government agency acquisition of neutrals' services, see Ruttinger, *supra* note 181, at 863, *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 885.

202. See EPA ADR Guidance Attachment E, *supra* note 197, *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 792.

ters may be formulated. Agencies should be flexible in defining the qualifications required of outside neutrals. Agencies also should avoid rigid technical and other expertise requirements. Agencies, Congress, and others employing ADR should further the following goals:

- increase the supply of ADR services available to the federal government;
- insure qualifications of neutrals;
- improve acquisition methods for hiring neutrals; and
- clarify neutrals' roles and authority.

There is great potential benefit in developing a central roster of ADR experts and, in particular, minitrial neutrals for contract cases.²⁰³ Rosters can save time and energy for parties seeking an advisor. They can help small boards find settlement or minitrial judges and serve to encourage creation of a cadre of reliable, expert neutrals to help resolve contract disputes consensually.

Given that a government-wide roster would be worth the effort, a number of questions arise: Who should be eligible for listing; should standards of experience, education, or third-party recommendations be set; if so, what criteria should apply; should those applicants who do not conform to the standards be rejected; and should the roster be limited to a small, elite group?²⁰⁴ Alternatively, should the roster be based on a disclosure principle? Under this theory, most or all applicants who provide certain data will be listed, and the parties will need to decide on a particular neutral. Would this stimulate a "cottage industry" of advisors? Should any particular groups, such as government personnel or private attorneys, be wholly excluded on grounds that one side or the other likely would strike them for possible bias or conflict of interest? How should complaints against allegedly incompetent or unfair advisors be handled? Should there be separate rosters for different kinds of cases or skills?

All of these questions will not be addressed exhaustively in this study, but several points are worth mentioning. *First*, the list proba-

203. Administrative Conference Recommendation 86-8 called for the compilation of such rosters. 1 C.F.R. § 305.86-8 (1989).

204. This is the situation in the District of Columbia Circuit Court of Appeals' new mediation program and the Center for Public Resources' list of "distinguished persons" available to help resolve certain disputes. This list is comprised of persons such as former judges, government officials, and executives. The theory behind this is that limiting the roster will enhance the credibility of the nascent minitrial process and tend to cause those on the list to view their role as a public service.

bly should include all who have experience as minitrial advisors. *Second*, it should include all administrative judges who wish to serve as neutral advisors for disputes within their own agency, another agency, or both.²⁰⁵ *Third*, the list should include all retired Claims Court, BCA, and federal judges who are interested. *Fourth*, in any case before a contracting officer of a BCA, the parties should have the option of selecting *any* mutually agreeable neutral who is available and has no clear conflict of interest, regardless of where the neutral comes from. *Fifth*, no standard fee scale should be established. Contrarily, neutrals should be encouraged to serve pro bono in some cases or at reduced rates. Agencies that expect to have their judges loaned out should consider developing standards for reimbursement by user agencies.

Several groups might be able to compile this roster and keep it updated. These groups include the Administrative Conference, the OFPP, and the Board of Contract Appeals Judge Association (BOCAJA). Resources permitting, the best-placed of these groups to administer such a roster is the Administrative Conference, working with the consultation of the groups mentioned and others knowledgeable about contract claims. The Administrative Conference's membership recently has approved a recommendation calling on its chairman to work with other agencies to establish rosters of neutrals from which agencies can draw.²⁰⁶ Similarly, the recommendation suggests that the chairman should encourage imaginative efforts to share federal neutrals and remove obstacles.²⁰⁷ The Administrative Conference's stated willingness to serve, combined with its relative objectivity and familiarity with the administrative process, makes it a natural candidate for this job.

C. Mediation

1. *Where Has it Been Used?*—Mediation, a second category of ADR, may be useful in government contract cases. In mediation, the parties try to reach a settlement by negotiating directly with each other with the help of a neutral mediator who often is specially

205. An informal arrangement now in place between the NASA, Department of Energy, and HUD Boards provides for exchanges of administrative judges when recusal of a settlement judge or retirement reduces the available panel to fewer than three. Interview with Judge Carroll C. Dicus, *supra* note 194. No legal obstacles appear to inhibit interagency sharing. Indeed, agencies for years have shared ALJs from time to time, with or without reimbursing the lender agency. Interview with Dick Berg, Marvin Morse, and Rollee Efros, *supra* note 190.

206. 1 C.F.R. § 305.86-8 (1989).

207. *Id.*

trained in dispute resolution. Several courts and agencies have instituted mediation programs, producing dramatic results for some. In addition to many district courts, several federal courts of appeal have introduced mandatory mediation for some cases.²⁰⁸ The Second, Sixth, and Eighth Circuit Courts of Appeals have had such a program for a number of years.²⁰⁹ In May 1987, the Court of Appeals for the District of Columbia Circuit commenced an experimental civil mediation program which requires attendance at an initial mediation session. At these sessions, distinguished senior members of the bar serve as mediators, and parties must be represented by someone with authority to enter into a settlement agreement during the session. Pro Se cases are excluded, as are those involving multiple parties or interveners.²¹⁰

2. *What Is it?*—There are two ways in which mediation typically is initiated. Either the parties voluntarily submit the matter to a public or private dispute resolution organization, or a court may suggest or order the parties to submit to mediation. Mediators generally are process-oriented. Their responsibilities include arranging meetings between the parties, assisting in the exchange of information, and relaying the parties' interests and positions. In fulfilling this role, mediators may conduct private meetings with the parties to facilitate the negotiations, and may participate actively by proposing settlements. In many cases, mediators do not need any special expertise in the areas of dispute. However, it often is helpful in contract cases if they do.

3. *Advantages and Disadvantages in the Government Contract Setting.*—One advantage of mediation is that it is often a fairly quick and inexpensive procedure. An additional attractive feature is that negotiations can be made confidential, or at least treated as settlement talks. Furthermore, to preserve future business relations and cooperation, the negotiations can be informal and relatively

208. See sources cited *infra* note 209.

209. See Goldman, *The Civil Appeals Management Plan: An Experiment in Appellate Procedural Reform*, 78 COLUM. L. REV. 1209 (1978) (an analysis of the Second Circuit's prehearing conference program); Martin, *supra* note 80, at 253; Rack, Jr., *Pre-Agreement Conferences in the Sixth Circuit Court of Appeals*, 15 U. TOL. L. REV. 921 (1984) (discussing the Sixth Circuit's prehearing program). A variety of Federal Judicial Center reports also have dealt with the issue of settlement conferences. See D. Provine, *Settlement Strategies for Federal District Judges* (Fed. Jud. Ctr. 1986); F. Lacey, *The Judge's Role in the Settlement of Civil Suits* (Fed. Jud. Ctr. 1977).

210. *D.C. Circuit and U.S. Claims Court Introduce ADR Program to Promote Case Settlement*, 19 THIRD BRANCH 1, 9 (June 1987) [hereinafter *D.C. Circuit ADR Program*].

nonadversarial. Finally, like arbitration, mediation helps to clear the courts' overloaded dockets.

There, however, are some disadvantages. Parties may feel uncomfortable using mediation in lieu of the formal CDA process. For example, some fear divulging their case in talks with an adversary who "lays behind the log" in bad faith. Another drawback of mediation is that it can be used simply to draw out the litigation with an added step. This, however, is not likely to be a major concern in government contract disputes that already take two to four years.

Ironically, informality, one of the biggest advantages of mediation, may be a hindrance in some government contract cases. Agreements between parties reached without the formality of a hearing or a written opinion may not stand up to rigorous review. They may be criticized for having less documentation or for not conforming exactly with certain precedent. Government negotiators justifiably are reluctant to settle a case with the knowledge that the informal procedure, and their performance, may not survive a legalistic review by the agency or a court. Contractors share the similar fear that they are wasting their time and money if other parts of the government will not accept the settlement. Though many of these problems can be corrected, many parties to contract litigation simply may be more comfortable with a more formalistic proceeding than with mediation.

Even given the foregoing concerns, mediation definitely deserves greater use in contract disputes. The best place to begin implementing mediation is with the boards. First, a scarcity of supergrade judge slots may make staff mediators attractive. Second, many current judges would benefit from this mediation training. At a minimum, boards should encourage mediation training and follow the lead of the District of Columbia Circuit by creating distinguished panels of available mediators. At a minimum, all boards should adopt the policies and rules described below which encourage and make the use of mediation possible.

D. Settlement Judges

1. *Current Usage.*—"Settlement judges" can be used to encourage parties to settle their cases without compromising the parties' ability to engage in subsequent litigation if they are unable to reach settlement. While some BCA judges have begun taking a more active posture in encouraging settlement, apparently only the Federal Energy Regulatory Commission and Occupational Safety and Health Review Commission have adopted rules for using settle-

ment judges.²¹¹ Under a United States Claims Court policy, parties to dispute in the court are to be notified at the outset that they may request a settlement judge to assist them in assessing their positions, resolving their dispute, or narrowing the issues in controversy.²¹² The settlement judge is another member of the Claims Court who works in confidence to guide the parties toward settlement.²¹³ If the procedure does not produce an agreement, the case typically is returned to the presiding judge's docket and the litigation is to proceed without prejudice toward either party.

2. *Benefits.*—This approach obviously can save time and money, though the benefits are difficult to quantify.²¹⁴ Another advantage is that parties seeking a sensible “business” solution can

211. See Joseph & Gilbert, *supra* note 187, at 287-91. In the early 1970s, the NASA Board's rules provided for appointment of an administrative judge to help the parties explore settlement. This procedure was discontinued several years ago. Interview with Judge Carroll Dicus, *supra* note 194.

212. See generally U.S. Claims Court General Order No. 13 (Apr. 15, 1987), reprinted in ADR SOURCEBOOK, *supra* note 70, at 731; D.C. Circuit ADR Program, *supra* note 210, at 9.

213. The settlement judge's role is subject, of course, to immense variation and is explored in detail in several studies sponsored by the Federal Judicial Center. See D. PROVINE, *supra* note 209; F. LACEY, *supra* note 209; THE ROLE OF THE JUDGE IN THE SETTLEMENT PROCESS, *supra* note 209. One illustration, however, may be enlightening. A United States Magistrate resolved a 1985 Corps of Engineers lawsuit filed in United States District Court against Allis-Chalmers for loss sustained as a result of recently discovered latent defects in generator coils installed in 1970. *United States v. Allis-Chalmers*, No. 85-C-567-B (N.D. Okla. June 26, 1986). The parties were asked by the Magistrate to submit five-page summaries a week before the settlement conference, and, at the conference, were expected to have someone in attendance with either authority to settle or enough influence that his recommendation would carry substantial weight. At the conference, the Magistrate had the parties discuss the issues and estimate the litigation expense they would incur in terms of attorney fees, out-of-pocket costs, and employee time. He then stated his belief that, while the trial judge would be conservative in any damages awarded, defendants did have an exposure to liability. The Magistrate then led the parties through a process of exploring settlement rationales and constructing the “building blocks of settlement.”

After this joint settlement conference, the Magistrate then met separately with each party. Each side frankly discussed the problems with its case, and each party stated its bottom-line settlement figures. The Magistrate did not reveal to the parties their opponent's settlement figures. Further, he promised not to develop his recommended settlement amount by splitting the difference between each side's bottom-line amount. The Magistrate announced his recommended settlement at a final joint session and gave the parties less than a day to accept the amount. He did not allow counter offers. Unless both sides accepted, they would not know whether the other agreed to the amount. Both parties advised the settlement judge the next day that, subject to Department of Justice approval, the recommended settlement figure was acceptable. This description is drawn from a memorandum by Rowe C. Wynn, Jr., Assistant Chief, Office of General Counsel, Corps of Engineers (Aug. 21, 1986) (copy on file with *Maryland Law Review*).

214. For an excellent discussion of problems in measuring the costs and benefits of ADR, see G. BINGHAM, *supra* note 77.

benefit from advice on how the case might be decided in court. The major disadvantage is that a judge's time is being used for something other than hearing cases. If the case does not settle, the extra step has engaged the time of *two* judges, and may, therefore, prove more inefficient than simply litigating the case to a decision. Also, some argue, it may be dangerous for a judicial figure to undertake to produce settlements on the basis of very limited information. The influence exerted by the judge may be disproportionate to his or her actual knowledge.

3. *Mandatory Use of Settlement Judges?*—Though agencies should provide rules for the use of settlement judges, only certain types of cases and parties will be susceptible to settlement. For this reason, requiring mandatory settlement conferences in all cases may be too drastic. If settlement judges were ubiquitous, parties might start routinely gaming with the settlement conferences as well as trials. Nonetheless, presiding and chief judges regularly should examine their dockets and suggest the use of a settlement judge whenever appropriate, since parties often are hesitant to raise the prospect of a settlement themselves for fear of appearing “weak.” A judge, however, quite effectively can focus parties’ attentions on their mutual interests. If they do nothing else, boards always should inform the parties that they may request a settlement judge.²¹⁵

E. Arbitration

1. *Defined.*—Arbitration is a flexible procedure in which the disputants present their cases to a neutral third party.²¹⁶ This neutral third party, usually selected by mutual agreement, hears the evidence and decides the award. Arbitration may be binding or nonbinding. If binding, the parties must abide by the arbitrator’s award unless a party appeals. Appeals, however, can be taken only under a highly circumscribed standard of review.²¹⁷ If nonbinding, the parties are free to accept or refuse the arbitrator’s recommended decision.²¹⁸ Arbitration typically is initiated in one of three

215. See 1 C.F.R. §§ 305.86-3, .86-7 (1989).

216. F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 2 (1985); Behre, *Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?*, 16 PUB. CONT. L.J. 66, 70 (1986), reprinted in ADR SOURCEBOOK, *supra* note 70, at 378.

217. Harter, *supra* note 77, at 165, 210-15, reprinted in ADR SOURCEBOOK, *supra* note 70, at 341-46 (agency may review decision to determine that it is not the result of any fraud, partiality, or other misconduct).

218. *Id.* at 176 (not reprinted in ADR SOURCEBOOK).

ways: (1) the parties agree before a conflict arises to submit all disputes to arbitration; (2) the parties agree to submit to arbitration after the dispute arises; or (3) a court, agency, or statute mandates that the dispute be arbitrated.²¹⁹

2. *Procedure and Experience.*—The exact procedure for presenting the case depends upon the arbitration agreement between the parties, but it invariably involves an arbitrator who hears evidence and renders an award. The procedure is informal, with limited discovery and relaxed evidentiary rules.²²⁰ An arbitrator's award is usually a one or two sentence conclusion. As opposed to a lengthy opinion issued by a judge, at most the arbitrator's decision will be accompanied by an abbreviated review of facts and the legal basis for the opinion. The arbitrator usually has technical knowledge of the area, and often has a legal background. He or she renders the decision pursuant to a standard chosen by the parties. This may be simply the law of a certain jurisdiction, the provisions of the contract, or even the arbitrator's own sense of justice.

3. *Advantages and Disadvantages.*—Arbitration is useful particularly when the parties have an ongoing business relation, as with the government and most contractors. The expedited process ideally will save the parties significant time and money. Since discovery is often curtailed and the hearing itself can be simpler than a judicial hearing employing all the rules of evidence, an arbitration proceeding often takes less time and money than a traditional trial. Moreover, the use of an expert cuts down on the time needed to educate the decision-maker on the technical issues. This, in turn, may lead to a more well-informed decision. Arbitration also does not have to be a public procedure, thus allowing the parties to protect trade secrets. Lastly, due to the limited scope of review, arbitration awards enjoy greater finality than most judicial or agency decisions. The main disadvantage of this technique is that occasionally extensive procedures are involved, resulting in a procedure which is nearly as slow and costly as a formal adjudication.

While many government contract disputes would seem well suited to arbitration, it has not yet been adopted. An Interdepartmental Board created in 1921 by the Director of the Bureau of the Budget to standardize government contract forms considered, but rejected, both the establishment of a central appeals board and the

219. *Id.* at 182, *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 311.

220. Behre, *supra* note 216, at 71, *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 379.

use of arbitration in contractors' appeals from the decisions of contracting officers.²²¹ The objections to these processes included the apparent need for authorizing legislation and that the department head would be deprived of the control necessary to discharge his statutory responsibilities.²²² During World War II, arbitration again was considered.²²³ Instead, agency boards were developed.

Several obstacles have prevented the use of arbitration to resolve government contract disputes. In 1981, the Interior Board ruled that agencies cannot submit contract disputes to arbitration when the contract's dispute clause requires otherwise.²²⁴ A more long-standing roadblock has been a series of opinions by the Comptroller General. Under these decisions, the government cannot be bound by arbitration unless the agency specifically is authorized by statute to engage in arbitration or the arbitration is limited to fact-finding.²²⁵ Finally, Articles II and III of the Constitution may restrict some government uses of arbitration.²²⁶ In most cases, however, agencies and Congress should be able to safeguard the process to avoid these problems.

In addition to these legal obstacles, there are some practical problems with arbitration. Because arbitrations are not always well documented and are less subject to public scrutiny, they lack some

221. Shedd, *supra* note 8, at 48.

222. *See id.* at 48-49.

223. *See Id.* at 49-50.

224. Dames and Moore, Inc., IBCA No. 1308-10-79, 81-2 BCA 76, 393 (Oct. 27, 1981).

225. This view allowing for limited use of arbitration is based largely on a fear that arbitrators who are not well informed on government appropriations and expenditure laws may make improper decisions. The Administrative Conference of the United States and many others have criticized this view and have urged Congress to overturn it. *See* 1 C.F.R. § 305.86-3 (1989); Harter, *supra* note 77, at 165, 191-95 (1986), *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 309; *see also* Behre, *supra* note 216, at 66, 67, *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 371, 375 (examining whether binding arbitration is a "permissible and more desirable" alternative to the resolution system of the CDA); Hardy & Cargill, *Resolving Government Contracts Disputes: Why Not Arbitrate?*, 34 FED. B.J. 1, 3 (1975) (examining the "desirability, legality, and feasibility" of private arbitration to resolve government contract disputes), *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 351, 353. One report argues convincingly that GAO's objections are without legal foundation and are unpersuasive. Berg, *Legal and Structural Obstacles to the Use of Alternative Dispute Resolution in Federal Programs*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS (Sept. 1987).

226. *See* Bruff, *The Constitutionality of Arbitration in Federal Programs*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 533 (May 1987). The questions presented by Bruff are whether Article II and Article III of the United States Constitution, addressing the executive power of the President and the judicial power of the federal courts, respectively, are infringed upon by arbitration. *See also* 1 C.F.R. §§ 305.80-3, .87-5 (1989).

of the "quality control" of trials. Arbitral awards, some fear, may not always accurately reflect the merits of the case, *e.g.*, when the arbitrator simply decides to split the difference between the parties. Another potential disadvantage is that arbitration generally does not establish precedent. Therefore, extensive use of arbitration may lead to some loss of uniformity. Finally, and probably most importantly, the parties may be reluctant to arbitrate because the scope of judicial review of awards is limited and they may be bound by an unsatisfactory and unappealable decision.

Many federal contract cases, however, are, on their face, good candidates for arbitration. These include cases in which: (1) the standard to be applied already has been established by statute, precedent, or rule; (2) the resolution of the dispute need not have precedential effect or establish major new policies; (3) the parties want the arbitrator to base his or her decision on some general standard without regard to a prevailing norm; (4) it would be valuable to have a decision-maker with technical, in addition to legal, knowledge; or (5) the parties desire privacy.²²⁷ Allowing arbitrators to make many of these decisions would allow BCA judges and the Claims Court to focus their managerial and decisional skills on significant cases with precedential or policy implications.

F. Disputes Review Boards

1. *Army Corps of Engineers Model.*—The South Atlantic Division of the Army Corps of Engineers has developed an ADR procedure to attempt to resolve factual, as opposed to legal, contract disputes at the contracting officer level.²²⁸ The government and the contractor may agree at the time the contract is signed to create a Disputes Review Board that is to review factual disputes arising under the contract. This Board consists of three members, one each representing the government and the contractor, and a third chosen by agreement of the parties.²²⁹ A contractor who is dissatisfied with a contracting officer's preliminary opinion may either request a final opinion, which can then be appealed, or submit the dispute to the Disputes Review Board, with the consent of the government.²³⁰

227. See 1 C.F.R. § 305.86-3 (1989), *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 113.

228. Department of the Army, Corps of Engineers, South Atlantic Division, Implementation of Alternative Contract Disputes Resolution Procedure (May 1986) [hereinafter South Atlantic Procedure], *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 721.

229. *Id.*, *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 726.

230. *Id.*, *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 727-28.

If the parties agree to submit the dispute to the Disputes Review Board, they must do so within thirty days of the receipt of the contracting officer's preliminary opinion.²³¹ At the hearing, both parties present evidence on the dispute to the Board.²³² The Board then has thirty days to make a factual recommendation.²³³ If the parties accept the Board's recommendation, the dispute is considered settled and the government expeditiously will make any required contract modifications. If the parties do not accept the recommendation, the usual dispute resolution procedures are followed.²³⁴

2. *Advantages.*—Because this procedure effectively takes care of disputes early in the process, the parties save both time and money and the BCA's docket is kept clear. It further saves time by creating the Board before any disputes arise. The Board members are kept up to date on the construction so that they already are acquainted with the project and do not have to be educated on the issues when and if a dispute does arise. Finally, the Disputes Review Board system addresses the statutory and constitutional problems of ADR by making the Board merely advisory and limiting it to factual disputes.

3. *Drawbacks.*—Allowing the parties to second-guess the contracting officer is a drawback of the procedure. The parties are entitled essentially to disregard the contracting officer's opinion, perhaps without legal authority to do so. Another potential problem relates to retaining the neutrals. It may not be economically feasible to keep one or more readily accessible. Review Boards would be more helpful in large contracts where keeping that individual abreast of the circumstances is a relatively minor expense as compared to the potential claim size.

G. Summary Procedure

1. *Definition and Description.*—Summary procedures for small claims are another alternative to litigation before BCAs. The "accelerated" and "expedited" processes authorized by the CDA permit abbreviated resolution of small claims.²³⁵ These processes have had

231. *Id.*, reprinted in ADR SOURCEBOOK, *supra* note 70, at 724.

232. *Id.*

233. *Id.*

234. *Id.*

235. The Act requires BCAs to provide for accelerated disposition of cases for claims

some utility, but their monetary limits are too low for them to have a major impact.

2. *Examples.*—A Navy policy authorizes resolution of small cases singly or in groups via a summary ASBCA process that can be binding. It requires contracting officers, “where appropriate, [to] afford contractors pursuing disputes of \$25,000 or less the opportunity to utilize the Summary Binding ASBCA Procedure.”²³⁶ “Precedential” cases are excluded.²³⁷ According to the Navy policy, participation is voluntary.²³⁸ If the parties do agree to participate, they also must waive their right to appeal under the CDA.²³⁹ Under this binding procedure, each party has a limited amount of time, usually one to two hours, in which to present its case to a single BCA judge, who renders a decision from the bench immediately following the presentations.²⁴⁰

Ideally, a judge would be able to hear numerous such cases in just a few days. This would help clear the BCA’s docket. For example, John Turnquist, Chief Litigation Counsel for the Navy, has proposed organizing a settlement week in which seven or eight judges dispose of 70-100 cases in summary proceedings.²⁴¹ The BCA’s docket would decrease dramatically as a result.

3. *Advantages and Disadvantages.*—As illustrated by the above discussion, the advantages of a summary process are readily apparent. The chief drawback similarly is recognizable. This procedure uses already overloaded BCA judges to resolve the cases. Considerable debate exists over whether it is better to use a week of a judge’s time to resolve ten small cases than to let those cases wallow in litigation.²⁴² The principal problem of this proposal is simply that a “settlement week” is very hard to schedule, and anything less may be inefficient.

of \$50,000 or less, and to establish expedited simplified procedures for disputes of \$10,000 or less. 41 U.S.C. §§ 607(f), 608(a) (1982).

236. Memorandum from Everett Pyatt, *supra* note 129 (discussing the Navy’s ADR Program). It also provides that a decision by a contracting officer requiring a full trial shall be reviewed. *Id.*

237. *Id.*

238. *Navy ADR Program*, *supra* note 126, at 367, reprinted in *ADR SOURCEBOOK*, *supra* note 70, at 848.

239. *Id.* at 369, reprinted in *ADR SOURCEBOOK*, *supra* note 70, at 850.

240. *Id.* at 368-69, reprinted in *ADR SOURCEBOOK*, *supra* note 70, at 849-50.

241. Interview with John Turnquist, *supra* note 124.

242. Another criticism is that the summary procedure is merely a thinly veiled attempt to engage in arbitration which may be prohibited statutorily. This attack, however, is without foundation since the decision-makers remain BCA judges.

H. Case Management

1. *Benefits.*—"ADR techniques in the hands of judges, no matter how well-trained and well-intended, will not significantly reduce cost or delay nor enhance litigant satisfaction unless they are premised upon a system that encourages and effectuates judicial management."²⁴³ Keeping track of caseloads and focusing parties' efforts help to create a "culture" in which timeliness, rather than extensions, becomes the norm and not the exception. Both the Administrative Conference and the American Bar Association's Public Contracts Section have called for greater use of case management.²⁴⁴ The Federal Trade Commission, for instance, has adopted a mandatory "fast-track" rule for all cases pending before its administrative judges. Under this rule, before a party files a petition or motion it must have made a good faith effort to settle the case or at least to narrow the issues.²⁴⁵ Prior to the required scheduling conference, the parties exchange nonbinding statements of claims and defenses. The administrative judge then sets a trial date for no more than six months from the time of the scheduling conference.²⁴⁶

2. *Experience.*—The Grant Appeals Board (GAB) of the Department of Health and Human Services uses an even more interventionist case management model.²⁴⁷ For example, the Board consolidates appeals involving common questions of law or fact so that a single hearing will suffice for all.²⁴⁸ Additionally, the Board periodically will give specific procedural directions to the parties to help them speed up the process.²⁴⁹ The Boards also may ask a party to clarify an argument or position if it is not clear to the judge, or to submit further factual or legal evidence to help develop the record.²⁵⁰ Following up on such issues, the judge frequently will use

243. GOVERNOR'S ALTERNATIVE DISPUTE RESOLUTION WORKING GROUP, DISPUTE RESOLUTION IN MASSACHUSETTS 32 (Nov. 1986).

244. See 1 C.F.R. § 305.86-7 (1989); Churchill, *supra* note 68, at 163 (noting American Bar Association's Public Contract Law Section's concern that the CDA mandate was not being fulfilled).

245. Berreby, *FTC Adopts Mandatory 'Fast Track' Rule for ALJ Cases*, 3 ALTERNATIVES TO HIGH COST LITIGATION 5, 15 (Nov. 1985), *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 647-48.

246. *Id.* at 16, *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 649.

247. See Cappalli, *Model for Case Management: The Grant Appeals Board*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 663 (1986).

248. *Id.* at 720.

249. *Id.* at 722.

250. *Id.* at 723-24.

written questions as the framework for the hearing.²⁵¹ "Having ascertained the factual and legal ambiguities in each side's case by careful study of the briefs and documentation submitted, the Member will ordinarily structure the conference or hearing as a forum for addressing these ambiguities."²⁵²

3. *Approaches.*—Another method of case management is to have the judge formulate the issues to be decided. The judge should do this early in the litigation rather than allowing the issues to emerge slowly during the pretrial phase. GAB members also employ warnings and sanctions to encourage compliance with time limits, and issue orders to show cause why a sanction should not be imposed or a preliminary finding not finalized. Another tactic is to encourage as many stipulations of fact as possible. This often forces parties to recognize the merits of their cases, and occasionally pressures parties to concede certain points, or even entire claims. On occasion, to aid in an informed decision, the Board specifically invites the parties to brief particularly complicated or important issues of law. Sometimes a party knows that it will lose its appeal because of a governing precedent and simply wants to exhaust its administrative remedy as quickly as possible so that it may bring suit in federal court. In such cases, the GAB is perfectly willing and able to issue a one or two paragraph summary decision.

Many of these case management techniques currently are being implemented at a few boards to speed up the resolution of government contract disputes. These approaches, however, require significant time and energy that BCA judges do not have. Case management also posits an active judicial role in framing cases for litigation that some may feel to be inappropriate and which may even hinder justice. As these perspectives make clear, case management should not become a fetish. The trend in federal district courts, nevertheless, clearly is in favor of instituting these methods. Given the likelihood of continued growth in caseloads and stable board sizes, case management may become a necessary tool for all boards.²⁵³

251. *Id.* at 724.

252. *Id.*

253. Besides the Cappalli report, a 1983 study for the Administrative Conference by Charles Pou and Charlotte Jones examined the varying ways in which several agencies have made use of some of these devices. Pou & Jones, *Agency Time Limits as a Tool for Reducing Regulatory Delay*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 835 (1987). This report, and the cases and articles it dis-

III. IMPLEMENTING ADR IN GOVERNMENT CONTRACT APPEALS

A. When Does ADR Work Best?

1. *Appropriate Issues.*—ADR has resolved a broad range of technical, monetary, and responsibility questions between contractors and procurement agencies. A variety of contracts and issues have been involved in cases which have used the minitrial format. For example, the first case using a minitrial involved a dispute regarding a highly technical satellite communications system at NASA.²⁵⁴ The Army Corps of Engineers minitrials have involved disputes over a variety of construction problems.²⁵⁵ The Navy's first two minitrials involved both auditing and legal issues with the same contractor (the specifics of which have remained confidential among the parties).²⁵⁶ The third involved an overhead cost allocation suit.²⁵⁷ The Department of Energy minitrial dealt with a subcontractor's claim based on "delays due to government changes in the project."²⁵⁸

All dispute cases potentially are appropriate for ADR use, except those which clearly are dependent on legal issues.²⁵⁹ The Corps "Tenn-Tom" minitrial showed that ADR techniques can be used effectively even when highly complex issues are in dispute.²⁶⁰ ADR, if implemented properly, is a useful alternative to litigation in the resolution of contract claims disputes in the following situations: (1) when there is a close factual question as to entitlement, and there are experts who support both the government's and contractor's position; (2) when agreement has been reached as to entitlement, but the parties cannot agree on quantum; and (3) when legal or technical staff presents an overzealous assessment of the government's position. The minitrial can demonstrate to the contracting officer or other principal the weaknesses, as well as strengths, of the government's position. This enables the contracting officer to bet-

cusses, suggest that agencies possess the authority to develop and enforce criteria for ensuring expeditious disposition of cases by ALJs and BCA judges.

254. See *Appeals Board Judges' Conference Explores ADR Applicability*, *supra* note 163, at 33.

255. *Id.*

256. Interview with John Turnquist, *supra* note 124.

257. *Id.*

258. *Complex Construction Dispute Settled by First Energy Board Mini-Trial*, 1 Alt. Dis. Res. Rep. (BNA) 45 (May 14, 1987).

259. Interview with Paul Killian, Esq., Watt, Tieder, Killian, Toole & Hoffar (July 10, 1987) (copy on file with *Maryland Law Review*). Mr. Killian has participated in, and written on use of minitrials in contract disputes.

260. *DoD Deputy IG Endorses Alternative Dispute Resolution*, FED. ACQUISITION REP., Aug. 1987, at 1, col. 1 [hereinafter *DoD Deputy*](Derek J. Vander Schaaf's comments at Administrative Conference of the United States ADR Colloquium).

ter assess the merits of the claim.²⁶¹

Substantively, the cases most often cited as appropriate for minitrial resolution are: (1) differing site disputes in which the parties disagree on the conditions of the site; (2) disputes arising from the agency changing the work required under the contract; (3) defects in contract specifications with which the contractor finds impossible to comply;²⁶² (4) defective pricing audits;²⁶³ and (5) disputes over construction and ship repair contracts. The minitrial process, however, would not be useful when contractor fraud is alleged.

2. *Case Size.*—The argument can be made that there is some minimum amount of controversy below which the value of the minitrial is exceeded by costs. Because ADR options are at such an experimental stage, quantitative evaluations of this nature would have a weak empirical foundation. It would be very difficult to compare the costs of ADR to the costs of going directly to the board or court. These three dispute resolution arenas are too diverse to make meaningful comparisons. It also is difficult to assess whether and how a dispute settled by ADR might have been settled otherwise. Therefore, the size at which the case is deemed appropriate for ADR settlement is hard to pinpoint. This determination is best left to parties of a particular dispute. While agencies might want to set up some standards, these should be flexible given the possible variations.

3. *Timing.*—To curtail discovery, the chief cause of expense and delay, one should agree to ADR sooner rather than later.²⁶⁴ In addition, the sooner in the process the parties get together to negotiate, the less rigid they likely are to be when discussing their cases, and the greater the possibility of reaching a mutually acceptable settlement. Another related consideration, especially for the government, is the reaction of the staff. The longer a team has been preparing and conducting discovery on a case, the less willing its members may be to accept a quick settlement decision because they will feel more knowledgeable about the dispute than the

261. Memorandum from Major Northrop, Assistant District Counsel, Corps of Engineers (Dec. 20, 1984) (after-action report, ASBCA Minitrial No. 28767) (copy on file with *Maryland Law Review*).

262. See *Federal Reclamation Bureau Soon to Adopt an ADR Policy*, 5 ALTERNATIVES TO HIGH COST LITIGATION 1 (Feb. 1987), reprinted in ADR SOURCEBOOK, *supra* note 70, at 591.

263. See *DoD Deputy*, *supra* note 260, at 1, col. 1.

264. See, e.g., Killian & Mancini, *Mini-Trials—Basic Principles and Guidelines*, CONSTRUCTION BRIEFINGS Mar. 1985, at 4.

principal.²⁶⁵

Minitrials have been conducted at all stages of the appeals process. Some have taken place before the parties responded to initial interrogatories, a number have occurred after significant discovery, and one, the above-mentioned Boecon case, took place after a six-week Board hearing.²⁶⁶ Minitrials also may be conducted even before a final decision is reached by the contracting officer, or after the decision, but before an appeal is filed. Since cases typically present several settlement opportunities as they progress, regular review can help find apt subjects for ADR.

Thought certainly should be given to using ADR at the contracting officer level. While the present study focuses on the appeals level, there is no contradiction between employing these methods at both the contracting officer and the BCA stages.²⁶⁷ Contracting officers settling more cases would alleviate the backlogs at the BCAs.²⁶⁸ The earlier that disputed contractual issues are brought to the contracting officer's attention, the sooner they can be resolved.²⁶⁹ Parties often would be less entrenched and more cognizant of what the dispute is about in the first place. This would enable them to deal with their problems directly and promptly. For these reasons, many have suggested implementing ADR before cases get to the boards.²⁷⁰

265. This happened in the Corps' Tenn-Tom case, in which an unhappy staff member used the "hotline" to request an Inspector General's investigation into the process and settlement. See Ruttinger, *supra* note 140; Report of Investigation, Tennessee Tombigbee Claim Settlement, Department of Defense Office of the Inspector General, Special Inquiries (July 29, 1986), *cited in* Page & Lees, *Roles of Participants in the Mini-Trial*, 18 PUB. CONT. L.J. 54, 69 n.40 (1988).

266. See *Complex Construction Dispute Settled by First Energy Board Mini-Trial*, *supra* note 258, at 45.

267. The only drawback to simultaneous minitrials at these two levels would be the appearance of a duplication of effort. Some agencies might not be able to fiscally justify such a dual effort.

268. Interview with Louis Spector, Retired Chairman of the ASBCA, and Retired Senior Judge of the United States Claims Court (June 17, 1987) (copy on file with *Maryland Law Review*).

269. Interview with Eleanor R. Spector, DoD Procurement (July 31, 1987) (copy on file with *Maryland Law Review*).

270. See Memorandum from Major Northrop, *supra* note 261. The report of the Commission on Government Procurement recommended a new level of claim consideration at which an informal review would occur in any case in which a contracting officer's decision was adverse to the contractor. The review would have allowed the agency to correct or amend some contracting officer's decisions before the contractor commenced litigation, and would have focused on the contracting officer's justification for the adverse decision and settlement possibilities. Contracting officer's decisions were to be submitted to a high level agency official, who was not involved in the contract's administration, for purposes of injecting an element of neutrality into the attempted settlement.

Some observers, seeing an erosion in recent years of many contracting officers' managerial authority, wonder whether this would inhibit the willingness of contracting officers to go out on a limb by negotiating a compromise. Contracting officers need their agencies behind them on these decisions.²⁷¹ A recent American Bar Association (ABA) report states:

[T]he contracting officer should have the authority to fulfill the mission of contracting in the most efficient and economical way, while assuring that the spirit and intent of the law is faithfully implemented. . . . Rather than stimulating efficiency, initiative and imagination, the current [DoD] acquisition environment blankets the contracting officer with oversight, laws and regulations. The magnitude of new laws and regulations has thrown a shadow on the contracting officer's authority, and the pace of change is too swift to be effectively absorbed and implemented. . . . In this atmosphere of intense oversight and close regulation, correct procedure becomes more important than substantive success in acquisition. Contracting officers can be so confined by compliance with regulations . . . that they are afraid to express ideas and afraid to act beyond their familiar routines. . . . [C]onstant changes in laws and regulations serve to neutralize the value of past training in contracting procedure.²⁷²

One way to involve the contracting officer in the minitrial is to make the contracting officer the government's principal. If the minitrial takes place before the contracting officer's decision, the contracting officer could present the settlement as his decision. On the other hand, if the minitrial occurs after the contracting officer's decision, the contracting officer always could change his mind and reconsider his decision.²⁷³ If both parties are satisfied with the settlement and the contracting officer's subsequent decision, no one should complain about improper influence. Minitrials seem to present far fewer concerns of improper influence on contracting officers. Skeptics, however, may wonder if informal advice from a BCA judge

The report also suggested that the parties hold a conference prior to the contracting officer's decision. Congress deleted the notion of a settlement conference because it would undermine the negotiating position of the contracting officer.

271. Interview with Louis Spector, *supra* note 268.

272. Bednar & Jones, *supra* note 44, at 5-6.

273. According to Robert T. Peacock, "[t]he [contracting officer] may reconsider or amend a decision even after a timely appeal has been taken." R. PEACOCK, A COMPLETE GUIDE TO THE CONTRACT DISPUTES ACT 40 (1986).

acting as a neutral can be disregarded.²⁷⁴

B. Negotiating and Living with ADR Settlements

1. *The Negotiation Process.*—During settlement negotiations, the principals typically meet alone to weigh the merits of the case and discuss areas of compromise. Many will have been advised by their technical advisors and counsel on the legal issues, advised by experts on technical issues, advised by auditors on the quantum aspects of the case, and advised by the neutral advisor on the merit of the case and the probable outcome at trial. No transcripts are kept of these proceedings. At most, intra-agency documents are prepared after the fact, explaining and justifying the outcome and perhaps describing the process for evaluative purposes.²⁷⁵

2. *Review or Approval of Settlements.*—There generally is no follow-up review of the ADR settlement. To be principals, the representatives must have prior authority from their agencies to settle the case. They must have the confidence that their agencies will support their decision to settle the case with the best interest of the government in mind. One dispute settlement was brought to the attention of the agency inspector general by an agency subordinate who believed that the agency's principal had given in too easily in the mini-trial negotiations. The inspector general's report generally endorsed the process. The inspector general determined that the parties in this case acted in the best interest of the government, but, in the future, greater justification should be provided for settlement decisions.²⁷⁶

An inspector general can perform its role of preserving accountability without intruding into the ADR settlement process. Inspector general reviews of these activities should be approached

274. *Pacific Architects & Eng'rs, Inc. v. United States*, 491 F.2d 734 (Ct. Cl. 1974), concerns a contracting officer's decision which the plaintiffs alleged was unduly influenced by the legal advice of a government lawyer. *Id.* at 744-46. Federal Acquisition Regulation (FAR) § 33.211(a)(2), promulgated in 1983, states that the contracting officer "shall . . . [s]ecure assistance from legal and other advisors." 48 C.F.R. § 33.211(a)(2) (1988). Thus, a contracting officer should be allowed to get advice from the BCA member acting as a neutral. Another case, *Kiewit Sons' Co. v. United States Army Corps of Eng'rs*, 714 F.2d 163 (D.C. Cir. 1983), addressed the issue of congressional pressure on a contracting officer, and found the mere existence of such pressure, without proof of effect on the outcome, enough to vacate a decision. *Id.* at 170.

275. Interview with Frank Carr, *supra* note 151.

276. The only other post-settlement agency reviews have been evaluations of their ADR programs and policies. This general assessment is useful to policymakers seeking to improve the process, and should help assure that the government's interest is served.

with caution, as excessive postreview of settlement outcomes could undermine the potential for further use. Arguably, however, some communication between the principal and the auditors for the agency (e.g., Defense Contract Audit Agency) prior to the actual initiation of the procedures occasionally may be useful. For example, the auditors might, on request, review a case that an agency has deemed appropriate for settlement. They could provide quantum data for the principals to assist with the settlement process. The auditors also may offer guidance on appropriate levels of documentation for settlements, taking into account considerations of both accountability and flexibility.

In some cases, Congress also may second-guess settlement decisions. An extreme example is *Blackhawk Heating and Plumbing Co. v. United States*,²⁷⁷ in which Congress questioned the settlement, urged the VA Administrator not to pay it, and ultimately forbade payment of the full settlement amount.²⁷⁸ Agencies must act carefully with ADR to avoid indefensible settlements and to provide oversight entities with an accurate view of the costs and benefits of their ADR uses. At the same time, however, members of Congress also must assume responsibility for a level of review that recognizes the transaction costs of formal adjudication and the need for compromise in many disputes.

3. *Documentation.*—The agency ADR procedure in nearly all cases should require some brief documentation providing justification for the settlement reached. This would improve accountability, especially for cases involving large dollar amounts, and ultimately would lessen the probability of any investigation. This need for rational settlement must be balanced with ADR's primary appeal of informality. The assurance of privacy in the negotiation process also is essential. If the details of the negotiation process are to become common knowledge, criticism from both sides might increase and inhibit future negotiations. If the process becomes too open, the incentive for using ADR will disappear.

The level of documentation necessary will depend on for whom it is being created. If it is created for oversight on the part of individuals outside of the agency, not much detail is necessary. If it is created for in-house use, as is more likely, the level of detail increases dramatically. The principal or his or her advisor should set

277. 622 F.2d 539 (Ct. Cl. 1980).

278. *Id.* at 544-45. For a discussion of the case in connection with using BCA judges as minitrial neutrals, see *supra* note 189.

down cost and other factors taken into consideration, any prenegotiation positions developed, and a statement justifying acceptance of the compromise. In sum, the report should encompass a reflection of the thought process or rationale of government officials who agreed to the settlement. This documentation need not significantly exceed what ordinarily would be used to justify negotiated settlements of government contract disputes. A price negotiation memorandum typically would be adequate. This justification memorandum should be written after the fact so that ongoing negotiations are not jeopardized or delayed. The neutral could help the parties draw up the justification memo, or even offer an advisory decision in a potentially sensitive case.²⁷⁹

C. Agency Policies

Despite the apparent initial success of ADR procedures, widespread use has not resulted. One possible explanation for the slow incorporation of ADR is that most public officials are adverse to change. Lessening the backlog of cases often is not enough of an incentive for officials to risk a new procedure by using ADR tools. Innovative policies must therefore balance a variety of interests and concerns. These include the parties' needs to resolve disputes efficiently so that personnel and resources can be refocused on more pressing matters, *i.e.*, maintenance of positive ongoing relationships, finality in decisions, needs for accountability, and procedural fairness.

The simplest way for an agency or board to introduce ADR in the contracts litigation process is to write and distribute a policy which encourages contracting officers and BCA judges to explore ADR. It should state clearly that high-level agency officers, or the board, support such initiatives and place the responsibility for implementing these policies or rules with contracting officers, government counsel, and judges. Further, OFPP should encourage development of such advice. Finally, a presidential executive order and changes in the Federal Acquisition Regulation (FAR) to encourage ADR also would be warranted.

An ADR policy can give both government officials and private contractors the encouragement they need to experiment with these techniques. One consideration, which may prevent parties from using any kind of ADR, is the possibility that one's opponent may view

279. Interview with Derek J. Vander Schaaf, DoD Acting Inspector General (May 27, 1987) (copy on file with *Maryland Law Review*).

a willingness to settle as a sign of weakness. An agency can avoid this problem by making it a policy to review systematically all cases for settlement potential. This policy should thus make it clear that not all cases need be litigated. Such a policy will convince contractors that choosing to settle rather than to litigate a case is often a sign of reasonableness, and that responsible agency officials will support settlements reached via duly selected ADR methods.

Persons who are experienced or familiar with ADR's potential success should perform an ADR susceptibility review. Many agencies, however, do not have such individuals. The BCA is an appropriate place to start such an endeavor because these judges are most familiar with different types of disputes and with managing the docket caseload.

The policy statements of the Corps, the Navy, the Justice Department, and the Claims Court essentially outline their recommended ADR procedures.²⁸⁰ The policies, emphasizing the voluntary nature of the procedures, eschew strict guidelines, and do not require anything in particular to be done. What they do establish is who has authority to approve the selection of a case for ADR consideration. These policies offer guidelines on many of the issues discussed in the previous sections of this study, *i.e.*, case selection, representatives, neutrals, and the nature of the agreement process and negotiation. The guidelines usually are fairly loose and allow the parties to design a procedure most appropriate for the particular case. For example, the South Atlantic Division of the Corps of Engineers has its own minitrial policy, in addition to that of the Corps.²⁸¹ Yet, in *Granite Construction*, the parties combined elements of the two policies into a third kind of ADR procedure.²⁸²

In formulating a specific policy, one must ask what roles the agency's BCA and contracting officers should play in the minitrial or other ADR process. The aim of ADR is to avoid litigation. There-

280. See United States Claims Court, General Order No. 13 and Notice to Counsel on Alternative Dispute Resolution Techniques (Apr. 15, 1987), *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 731; Circular on ADR, *supra* note 108, *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 703; Memorandum from John Lehman, *supra* note 125, *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 847; Memorandum from Stuart E. Schiffer, Deputy Assistant Attorney General Civil Division, to the Attorneys of the Commercial Litigation Branch (June 19, 1986) (discussing ADR and attaching a statement of policy regarding the use of minitrials), *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 827.

281. See South Atlantic Procedure, *supra* note 228, *reprinted in* ADR SOURCEBOOK, *supra* note 70, at 721.

282. See Pou, *Federal Agency Use of ADR: The Experience to Date*, in CONTAINING LEGAL COSTS, *supra* note 108, at 225.

fore, it would be logical to implement minitrials before the BCA is even involved in the case.²⁸³ This saves the parties time, clears the board's docket for cases which should be litigated, and avoids some possible formalism and institutionalization which the board might impose. The policy should ensure that control over the structure of the ADR process is not transferred from the parties to the judge.²⁸⁴ A policy implemented by the board, however, may imbue the process with added legitimacy in the eyes of inspector generals and Congress. Furthermore, the board's formal approval of a settlement finalizes the issue, and will protect it from second-guessing by the agency or Congress. Finally, in the interest of preserving their independence, judges may well prefer to issue their own policy rather than have one imposed upon them.²⁸⁵

D. Rule Changes

Contracting agencies and their BCAs also should consider changing their rules of practice to encourage the use of ADR. While agencies should be careful not to over institutionalize ADR, there should be a rule that requires contracting officers to alert appellants of ADR possibilities. This would ensure that the parties realize the availability of the ADR alternative. In many disputes, this may be all the parties need to commence a process leading to settlement. If ADR is chosen early in a case, the savings would be dramatic. In the long run, rule changes to encourage the use of ADR could play a significant role in making these techniques a more common and accepted procedure.

There, however, are some drawbacks to innovating through rule changes. Adoption of a new rule can be extremely laborious. Some boards, notably the ASBCA, are subject to a burdensome, high-level, sign-off procedure. Furthermore, rules often lead to unwanted formalism. Parties often adhere only to the letter of the law, and will demand explicit authority to adopt any procedure which is not enumerated specifically. Rule changes may not be necessary for all agencies. In smaller BCAs, in which communication among the judges and litigants is more direct, the agency's ADR policy may be better known than at the larger boards. A rule is worth considering, nonetheless, since it also would indicate an agency commitment to

283. Indeed, arbitration would substitute a private decider in less important, non-precedential disputes.

284. Interview with Paul Killian, *supra* note 259.

285. See 41 U.S.C. § 607(b)(1) (1982) (BCA judges are appointed in the same manner as ALJs).

procedural innovation. Further, BCA judges would possess clear authority to encourage ADR. Finally, adopting such a rule would send a message to contract officials and contractors that the agency encourages the use of ADR.

An agency rule on ADR should: (1) authorize and encourage agency officers to make use of alternative means of dispute resolution; (2) make provisions for automatically alerting the parties, both at the contracting officer level and as soon as an appeal is filed, that one or more ADR methods is available;²⁸⁶ (3) authorize a judge to encourage its use and to require the attendance of at least one representative of each party who has authority to settle all matters at any conference held for the purposes of proposing or implementing ADR; (4) briefly describe the alternatives; and (5) authorize the parties to agree to vary any procedural rule in their case. While it is likely that administrative judges and officials already possess these powers,²⁸⁷ explicit authorization certainly would allay any existing doubts.

Changes can be made either to the procedural rules of each individual agency or board, or to the government-wide central regulations and guidelines.²⁸⁸ The Public Contract Law Section of the ABA is considering a recommendation to change the ASBCA rules to authorize the board to call a conference to consider the possibility of agreement or ADR procedures which might dispose of any or all of the issues in dispute.²⁸⁹ Such an addition to the rules of the ASBCA or other boards could make a substantial difference in the resolution of contract disputes.

A more sweeping rule change would allow a BCA judge to impose sanctions on a party for refusing unjustifiably to participate in

286. Many interviewees recommend including a statement on the ADR alternative in the docketing notice. *See, e.g.*, interview with Judges David Doane and Russell C. Lynch, Interior BCA (July 17, 1987) (copy on file with *Maryland Law Review*); interview with Emanuel P. Snyder, Chief Judge, Transportation BCA (May 4, 1987) (copy on file with *Maryland Law Review*). The Claims Court has done precisely this in its notice to counsel explaining the operation of its minitrial and settlement judge policies. *See Claims Court Approves ADR for Complex Federal Cases*, 5 ALTERNATIVES TO HIGH COST LITIGATION 137, 144 (Sept. 1987).

287. Some federal district courts have mandated exploration of ADR use by rule, and have even made mediation or arbitration mandatory in certain kinds of cases.

288. Strong arguments can be made for issuance at the agency level, as opposed to the sub-agency (*e.g.*, Corps or Navy) or board level. As a practical matter, though, agency rules at any level are likely to suffice.

289. ABA Alternate Disputes Resolution Committee of the Section on Public Contract Law, Draft Recommendations (Apr. 8, 1987) [hereinafter ABA Draft Recommendations] (covering the use of ADR procedures by the ASBCA).

settlement efforts. This would mirror some draft legislation and proposed Federal Rules of Civil Procedure changes which provide that sanctions could be imposed on any party who fails to participate in good faith in any settlement conference. In all likelihood, BCA members now have the authority to impose sanctions for failure to participate in good faith once a party has agreed to do so. An explicit rule should be considered to make that authority clear.

Multinational Legal Services (MLS), a Washington consulting firm, has taken a different approach. MLS recommended to the OFPP that the FAR should be changed to encourage settlement through ADR. MLS proposes adding the following paragraph to FAR 33.204, which states that it is the government's policy to try to resolve all contractual disputes by mutual agreement:

Specifically, the contracting officer, before issuing a decision likely to be unacceptable to the claimant, shall recommend to the non-Government parties and the representatives of the Government involved in the dispute that they seek to resolve their differences by methods other than litigation and that they agree on an alternative method of dispute resolution (ADR), such as a minitrial, mediation, arbitration, a settlement judge or administrative judge or some other neutral person, a two-team settlement process, or some other method of ADR as promises an agreed resolution of the dispute without the litigation following upon a decision of the contracting officer on the claim of the non-Government party.²⁹⁰

MLS argues that this regulation change will do three things:

[I]t will unambiguously affirm that ADR is as much or more the policy of the United States as is litigation [I]t introduces ADR at the contracting officer's level—before the parties have been caught up in a formal 'dispute', with pleadings, briefs, subpoenas and depositions [And] the benefits of resolution by ADR of many disputes will, in turn, speed up the progress of those other cases requiring formal litigation.²⁹¹

The notion of greater OFPP and FAR guidance, which strongly supports the use of ADR at both the contracting officer and BCA level, has great merit.

In conclusion, any rule changes should be broad and permis-

290. Letter from David Schwartz to Robert B. Bedell, *supra* note 46.

291. *Id.*

sive. They must neither add more layers to the resolution process, nor detract seriously from the voluntary nature of ADR.

E. Contract Clauses

Still another means of implementing ADR in the contract process is to write a broad ADR clause into government contracts. Such a clause alerts the parties to the alternative even before a dispute arises. This may make it easier to initiate and implement the procedure should the need arise. Standard and optional dispute resolution clauses authorizing ADR should be prepared for agency use.²⁹²

F. Statutory Changes

There do not appear to be any major statutory obstacles in the Administrative Procedure Act or the CDA to using any form of ADR (except perhaps binding arbitration)²⁹³ to resolve government contract disputes.²⁹⁴ Legislation, however, would give agencies and boards a strong policy signal, provide an incentive to use ADR, and eliminate any existing ambiguity as to agency power to engage in these common sense procedures in resolving disputes. Several other policy changes may be beneficial. First, contracting officers should be encouraged to settle cases. Second, as repeatedly recommended by the Administrative Conference,²⁹⁵ Congress should authorize the use of arbitration in contract disputes at the agency's sound discre-

292. Recently, the Corps' South Atlantic Division inadvertently conducted an experiment of sorts when it accidentally inserted a voluntary alternative disputes review process clause in four solicitations. The Corps had decided not to include the clause for fear that even though the language specifically provided that the process was voluntary, it might have resulted in higher bids. Memorandum from Stephen Lingenfelter to Lester Edelman, *supra* note 117. For a sample minitrial clause in a contract between private parties, see Killian & Mancini, *supra* note 264, at 20.

293. See Berg, *supra* note 225; Bruff, *supra* note 226, at 535.

294. See, e.g., letter from David Schwartz to Robert B. Bedell, *supra* note 46.

We believe that there is no legal obstacle to an ADR solution to a dispute before or after the contracting officer makes his decision. If it occurs before the contracting officer's decision, the alternative resolution simply becomes the contracting officer's decision; if after his decision, it becomes the settlement agreement with the agency.

Id.

295. The Conference called on Congress to allow agency arbitration in Administrative Conference Recommendations 86-3 and 87-5. 1 C.F.R. §§ 305.86-3, 87-5 (1989). In 1987, the Administrative Law Section of the ABA approved a resolution virtually identical to Recommendation 86-3. See *Recommendation 86-3: Agencies' Use of Alternative Means of Dispute Resolution*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 9 (1986); *Recommendation 87-11: Alternative for Resolving Government Contract Disputes*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 60 (1987).

tion.²⁹⁶ At a bare minimum, some consideration should be given in appropriations decisions to funding for training and outreach programs because these programs will increase agency use of ADR.

G. Training and Outreach

Training of, and outreach to, the contracting community is vital to promoting ADR in the government contracts field. Judges and neutrals should receive training in mediation and other ADR skills to help facilitate use of these procedures. Agency personnel must be educated about both the availability of ADR and how to use it properly. Private contractors must be made aware of alternatives and assured that these are fair and efficient procedures and are not just another onerous system of adjudication.

1. *Training.*—Many BCA judges and the majority of contracting officers do not have adequate training in case management and mediation to either help them act as a neutral in a minitrial or even to comprehend fully what ADR encompasses. The Navy, for example, does not provide any formal training to its personnel, but discusses the procedure to be followed on a case-by-case basis.²⁹⁷ Providing training to its personnel should be one of each agency's priorities.

Judges have a variety of concerns regarding ADR in general and minitrials specifically. These concerns include resolving disputes as efficiently and accurately as possible, lessening their caseload, and preserving their independence and neutrality. Some administrative judges view ADR with apparent resistance. Many BCA judges are unwilling to "manage" hearings or to resolve cases in the most expeditious way because they view themselves as onlookers who ultimately may make the decision.²⁹⁸ BCA judges, however, need not feel like onlookers. They could participate actively by developing and overseeing any new rules, regulations, or policies on ADR within their agencies. Efforts must be made to demonstrate that the short term burden of case ADR review is worth the long term goals of increased settlements at an expedited pace with a result of better overall case management.

296. At the least, parties should be authorized to agree to arbitrate non-precedential disputes that have arisen. Arbitration clauses in acquisition contracts pose more substantial concerns, and are less clearly desirable.

297. Interview with John Turnquist, *supra* note 124.

298. Korthals-Altes, *The Applicability of Alternate Dispute Resolution Techniques to Government Defense Contract Disputes* (May 1986), reprinted in ADR SOURCEBOOK, *supra* note 70, at 147.

Training for government personnel can be accomplished in a number of ways. First, the Federal Mediation and Conciliation Service or others could conduct courses at the agencies, focusing on whichever ADR method the agency deems appropriate. Private organizations like the American Arbitration Association and the Center for Public Resources also could provide valuable training. The BOCAJA and other professional organizations also could sponsor seminars on ADR for judges. Still another possibility of providing training is to include ADR in the curriculum at the Defense Weapons System Management College, and other bodies which train contract projects managers. The DoD apparently has been more successful training its contracting officers than many other agencies, but the General Services Administration is now starting a contracting officer training program.²⁹⁹ The teaching of ADR skills easily could be incorporated into these programs.

Each agency should designate a representative as its ADR specialist. This would help to expedite its ADR development and better coordinate implementation. There are a number of issues involved in the choice of an ADR specialist. These include what part of the agency the specialist might be from, what type of training or experience might be required, what the job description might look like, and how that individual might be compensated. For example, DoD currently has no central database for tracking contract disputes, and thus is unable to identify types of cases that could be settled using ADR procedures.³⁰⁰ An agency ADR specialist could administer such a system to expedite the consideration and implementation of ADR.

2. *Outreach.*—Many experts attribute the lack of utilization of ADR in part to a lack of knowledge of the subject by agency personnel and contractors. To combat this ignorance, outreach and public relations of ADR's benefits is encouraged strongly. Education is a slow process, and even the most flexible bureaucrats are slow to change. Even given a general awareness in the procurement community of ADR, others see institutional impediments to implementation of these alternatives and maintain that education and outreach efforts only would have a limited effect. There also is debate as to the source of an ADR outreach program. It is arguable whether it should come from within the agency as a directive or from some outside source.

299. Interview with Judges David Doane and Russell C. Lynch, *supra* note 286.

300. *DoD Deputy*, *supra* note 260, at 1.

An agency will have difficulty implementing an ADR policy until it has educated both its own personnel and private contractors. Many individuals still are skeptical about ADR, and they must be shown that these techniques actually have worked. Within the government, the education should be focused on BCA judges, contracting officers, counsel, and auditors. In addition to spreading the news by word of mouth, agencies could cooperate with other interested groups to sponsor seminars to educate their personnel on the uses of ADR. The DoD, for instance, is planning to have the Navy give a presentation on its minitrial experiences to personnel from each of the four services.³⁰¹

Professional associations and institutions involved in government contract disputes (including BOCAJA, the Armed Services Trial Lawyers Association, and the National Contract Management Association) would be useful for promoting ADR.³⁰² Private sector participants in the government contract procurement area similarly should be active in ADR development. Other outside actors might want to do follow-up studies and reports of these activities, their success and limitations. Groups like the National Institute for Dispute Resolution, the Center for Public Resources, Endispute, the American Arbitration Association, and the Federal Mediation and Conciliation Service, also could be helpful in ADR education and training, as these groups have experience in this area.

Conferences or seminars featuring presentations, working groups, and position papers should be employed to educate people about ADR processes. Participating groups and agencies should include the Administrative Conference, the BOCAJA, the Armed Services Trial Lawyers Association, the Center for Public Resources, the Federal Mediation and Conciliation Service, the Public Contract Law Section of the ABA, the Association of General Contractors, and the National Contract Management Association. This conference would be directed at both government personnel and private contractors.

There also are other ways to reach the private sector. Something as simple as including an ADR policy statement in the docketing notice could make a big difference. An endorsement of the process by the ABA also could help legitimize and publicize ADR among contractors. The ADR Committee of the ABA's Section on

301. Interview with Eleanor R. Spector, *supra* note 269.

302. Interview with C. Stanley Dees, Chairman, ABA Section on Public Contract Law (July 24, 1987) (copy on file with *Maryland Law Review*).

Public Contract Law has recommended that the Program Committee of the Section and its various divisions conduct educational programs on the Navy's and Corps' ADR procedures.³⁰³ In these programs, particular emphasis should be placed on informing and educating small and medium-sized contractors of the existence of these alternatives.³⁰⁴ The various contractor associations also could help disseminate information on ADR. A number of minitrials conducted by the government have occurred because the contractors had heard of minitrials and suggested the possibility to the agencies. The more highly publicized the alternatives are, the more successful any program will be.

CONCLUSION

ADR has adapted well to traditional agency decision-making formats. When these methods have been used, they have worked. Apparently, these techniques are flexible enough for a variety of organizational settings. Regulations and policies did not need to be altered dramatically. As a result, some agencies do not see the need for an ADR policy. We disagree. Codifying or announcing policies would create greater awareness of ADR proceedings and enhance the probability of their utilization.

Agencies should adopt policies promoting and encouraging ADR techniques on a voluntary basis. An agency policy should encourage regular review of cases for susceptibility, with caution not to undermine the process with excessive regulations and standardization. The policy should offer advice on how to document the process and justify settlements, to protect decisionmakers and allow for an effective evaluation of these alternatives. Policies should be supplemented with training and outreach efforts on ADR applications. Whether these efforts will suffice remains to be seen. Without these kinds of initiatives, government contract disputes will continue to be handled in a manner that leaves most parties dissatisfied.

303. ABA Draft Recommendations, *supra* note 289.

304. *Id.*